CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1918

No. 599

CARL F. STREIBERMANN AND [illegible]
COMPANY, PROPOSED INTERVENER,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE, PETITIONERS,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX.

	Page
Record from D. C. U. S., Middle District of Pennsylvania	1
Docket entries	1
Amended bill of complaint	3
Exhibits "A" and "B"—Requests for change of policies so as to provide for increasing disability benefits	20
Exhibit "C"—Further application as to proposed policy	23
Exhibit "D"—Policy No. 2,646,105	33
Exhibit "E"—Policy No. 2,677,078	70
Exhibit "F"—Application for policy	108
Exhibit "G"—Policy No. 4,361,192	118
Motion to dismiss amended bill of complaint	153
Opinion, Watson, J., and order dismissing amended bill of complaint	158
Opinion, Watson, J., and order sustaining original bill of complaint	160
Petition for appeal	168
Order allowing appeal	169
Assignments of error	169
Citation and service	170
Præcipe for transcript of record	172
Order authorizing clerk to transmit record	173
Proceedings in U. S. C. C. A., Third Circuit	174
Minute entry of argument and submission	174
Opinion, Davis, J.	174
Judgment	179
Clerk's certificate	180
Order allowing certiorari	180

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 13 1937.
—8715-C

IN THE DISTRICT COURT OF THE UNITED STATES

For the Middle District of Pennsylvania

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, A CORPORATION AND CITIZEN OF THE STATE OF NEW YORK

vs.

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE, CITIZENS AND RESIDENTS OF PENNSYLVANIA.

No. 973 June Term, 1932

In Equity

I.
DOCKET ENTRIES

Oct. 11 1932	Bill of Complaint.
Oct. 11 1932	Subpoena issued returnable 20 days after service.
Oct. 11 1932	Certified copies of Bill handed U. S. Marshal (2).
Oct. 18 1932	Subpoena returned served also copies of bill.
Oct. 31 1932	Motion to dismiss bill.
May 17 1934	Opinion and
May 17 1934	Order denying motion to dismiss.
Jul. 9 1934	Answer.
Dec. 3 1934	Order continuing case to be placed on trial list for Jan. Term, 1935.
Jan. 21 1935	Order continuing case to be placed on trial list for May Term, 1935.
Apr. 1 1935	Petition to amend bill of complaint and
Apr. 1 1935	Order granting rule returnable Apr.

16, 1935.

Apr. 18 1935 Order granting plaintiff leave to file an amended bill of complaint, and rule dated April 1, 1935, made absolute.

Apr. 18 1935 Plaintiff's Amended Bill of Complaint.

May 16 1935 Motion to dismiss amended Bill of Complaint.

Jul. 2 1935 Opinion and

Jul. 2 1935 Order, the amended bill of complaint is dismissed, plaintiff to pay the costs.

Sep. 6 1935 Petition for appeal and

Sep. 6 1935 Order allowing appeal. Bond in sum of $250.00 required.

Sep. 6 1935 Assignments of error.

Sep. 6 1935 Citation issued and mailed O'Malley, Hill, Harris & Harris, Esqs.

Sep. 10 1935 Bond on appeal in the sum of $250.00 and

Sep. 10 1935 Order of approval.

Sep. 16 1935 Copy of citation and acceptance of service thereon.

Sep. 16 1935 Praecipe for record on appeal and approval of appellees and

Sep. 16 1935 Order authorizing and directing Clerk U. S. District Court, to mail all the original files specified in praecipe to Clerk U. S. Circuit Court of Appeals, 3rd, Cit. for purpose of printing the transcript of the record on appeal.

Sep. 17 1935 Papers numbered 1 to 9, both inclusive, mailed Clerk, U. S. Circuit Court of Appeals, Phila. Pa.

II.

AMENDED BILL OF COMPLAINT
(Filed April 18, 1935)

To the Honorable,
the Judges of Said Court:

Your Orator, The Mutual Life Insurance Company of New York, complains and says:

First: Your Orator is a corporation duly incorporated under and by virtue of the statutes of the State of New York, is a citizen and resident thereof, with its principal office in the City, County and State of New York, and is duly authorized by its charter to issue policies of life insurance and is engaged in said business. Your Orator has complied with all the requirements of the statutes of Pennsylvania with reference to the conducting of life insurance business in Pennsylvania by a corporation of another state.

Second: The defendant, Carl F. Stroehmann, is a citizen and resident of the State of Pennsylvania and of the Middle District thereof, residing in the City of Harrisburg, Dauphin County, in said District and State. The defendant, the Lycoming Trust Company, is a corporation of the State of Pennsylvania, conducting the business of a Trust Company, and having its principal office and place of business in the City of Williamsport, in Lycoming County, in said Middle District of Pennsylvania.

Third: The amount in controversy in this case is in excess of the sum of three thousand dollars ($3000.00) exclusive of interest and costs.

Fourth: On the 15th day of September, 1919, at Ashland, Kentucky, the defendant, Carl F. Stroehmann, applied to the plaintiff company for

insurance upon his life in the amount of Five Thousand Dollars ($5000.00) in favor of his sister, Irene L. Strochmann, reserving, however, to said insured the right to change the beneficiary or otherwise modify the policy, without the consent of the beneficiary, said policy to contain a provision for disability benefits, including waiver of premiums, in the event of total and permanent disability.

Fifth: On the strength of the said application, the plaintiff company issued its Policy No. 2646105, under date of September 20, 1919, in the amount of Five Thousand Dollars ($5000.00) for the annual premium of One Hundred Twelve Dollars and Five Cents ($112.05), to be paid on the 20th day of September in each year during the continuance of the policy. Included in said annual premium of One Hundred Twelve Dollars and Five Cents ($112.05) was the sum of Four Dollars and Fifty Cents ($4.50) as additional premium to cover the disability benefit features of said policy.

Sixth: Under date of December 12, 1919, the said Carl F. Stroehmann, at Ashland, Kentucky, applied for an additional policy of insurance upon his life in the amount of Five Thousand Dollars ($5,000.00), basing his application upon the previous application, the beneficiary to be named in such policy being also the sister, Irene L. Strochmann, with all rights reserved to the insured to change the beneficiary of said policy without the consent of said beneficiary.

Seventh: Upon this application for additional insurance and relying upon the statements therein contained, the plaintiff company issued Policy No. 2677078, under date of December 9, 1919, in the amount of Five Thousand Dollars ($5000.00). The annual premium to be paid for said policy was the

sum of One Hundred Twelve Dollars and Five Cents ($112.05), payable on the 9th day of December in each year during the continuance of the policy, and included in said amount was the additional premium of Four Dollars and Fifty Cents ($4.50) to cover the disability benefit features of the policy.

Eighth: Under date of February 24, 1927, upon the request of the said insured, assented to by the plaintiff, the beneficiaries in said Policies Numbers 2646105 and 2677078 were changed to Lycoming Trust Company, Williamsport, Pennsylvania, as trustee, or its successor trustee. The said Lycoming Trust Company, Trustee, is made a defendant herein.

Ninth: On the 9th day of February, 1928, the defendant, the insured in said policies, Carl F. Stroehmann, signed an application under each policy at Williamsport, Pennsylvania, asking that the two policies be amended so as to provide for increasing disability benefits, and relying upon said application, the said plaintiff company, on the 23rd day of February, 1928, attached to said policies of insurance, numbered respectively 2646105 and 26,-77078, riders providing for these increasing benefits. True and correct copies of the applications for said increasing disability benefits are attached hereto and made a part of this amended bill of complaint as fully as though set forth at length herein, marked respectively Exhibits "A" and "B".

Tenth: Accompanying the said application for additional disability benefits, the defendant, Carl F. Stroehmann, made a further application and submitted to further medical examination as consideration for the addition to said policies of insurance hereinabove referred to. A true and correct copy of said further application, dated at Williamsport,

Pennsylvania, February 7 and February 11, 1928, is attached hereto and made a part of this amended bill of complaint as fully as though set forth at length herein, marked Exhibit "C".

Eleventh: Relying upon the truth of the representations contained in said applications for change, marked "Exhibits 'A', 'B' and 'C' ", the plaintiff company added riders or additional provisions to said policies providing for increased disability benefits, as will appear by reference to the terms and conditions thereof, as hereinafter set forth.

Twelfth: The original policies of insurance with the riders thereon as set forth are in the possession of the defendant or defendants. Copies of the same, however, as disclosed by the records of the plaintiff company, which are believed to be true and correct copies, are attached hereto and made a part of this amended bill of complaint as fully as though set forth herein, marked Exhibits "D" and "E".

Thirteenth: On the 25th day of June, 1930, at Norristown, Pennsylvania, the said defendant, Carl F. Strochmann, applied for another policy of insurance in the plaintiff company in the amount of Forty Thousand Dollars ($40,000.00), the beneficiary to be the Northern Central Trust Company as trustee, or its successor trustee, reserving, however, to the insured the right to change said beneficiary or the terms of said policy without the consent of said beneficiary. A copy of the application for said policy of insurance in the sum of Forty Thousand Dollars ($40,000.00) is attached hereto and made a part of this bill of complaint as fully as though set forth at length herein, marked Exhibit "F".

Fourteenth: Relying upon the truth of the statements contained in said application, the plaintiff

company issued its Policy No. 4361192, under date of June 30, 1930, in the amount of Forty Thousand Dollars ($40,000.00) in favor of the Northern Central Trust Company as trustee. The said policy provided for an annual premium of Thirteen Hundred and Seventy Dollars ($1370.00) to be paid on the 30th day of June in each year, and included in this premium of Thirteen Hundred and Seventy Dollars ($1370.00) was the sum of Two Hundred Thirty-eight Dollars and Eighty Cents ($238.80) covering the disability benefit features of said policy.

Fifteenth: Upon application of the insured, Carl F. Stroehmann, defendant herein, the beneficiary in said policy was changed on the 26th day of September, 1930, by and with the consent of the plaintiff company, to Lycoming Trust Company, one of the defendants named herein.

Sixteenth: The said policy of insurance was duly delivered to the defendant, Carl F. Stroehmann, and is in the possession of said defendant or of the said Lycoming Trust Company as trustee, beneficiary, also a defendant. A copy of said original policy made up from the records of said plaintiff company and believed to be a true and correct copy of said original policy, is attached hereto and made a part of this amended bill of complaint as fully as though set forth at length herein, marked Exhibit "G".

Seventeenth: In the application for increased disability insurance under Policy No. 2646105, said application being attached hereto as Exhibit "A", it was agreed inter alia between the insured, Carl F. Strochmann, Defendant, and the plaintiff as follows:

"3. That the medical examination made on

the 11th day of February, 1928, is offered as a consideration for the change requested and that the statements and answers therein are true, and that the Insured has not consulted any physician, has had no sickness, injury or impairment of health since such date, and is now in good health.

"4. That if the above statements as to occupation or travel or the statements or answers in said medical examination shall be in any respect untrue, or if any Disability Benefits shall be claimed and if it shall appear that disability originated before the date of the granting of this request, any disability benefits granted under said policy shall be only those, if any, provided for in said policy before the change herein requested was made."

Eighteenth: Similar agreements to those in the last preceding paragraph were also made in the application marked Exhibit "B" for increasing disability provisions under Policy No. 2677078, as follows:

"3. That the medical examination made on the 11th day of February, 1928, is offered as a consideration for the change requested and that the statements and answers therein, are true, and that the Insured has not consulted any physician, has had no sickness, injury or impairment of health since such date, and is now in good health.

"4. That if the above statements as to occupation or travel or the statements or answers in said medical examination shall be in any respect untrue, or if any Disability Benefits shall be claimed and if it shall appear that disability originated before the date of the

granting of this request, any disability benefits granted under said policy shall be only those, if any, provided for in said policy before the change herein requested was made."

Nineteenth: In the said medical examination and application, a copy of which is attached hereto and marked Exhibit "C", and which is referred to in Exhibits "A" and "B" in the provisions thereof just quoted, in the statements of the insured to the medical examiner, the following questions were asked and the following answers made by the insured:

"16. What illnesses, diseases, injuries and surgical operations have you had since childhood?

Name of disease, etc.: Appendicitis operation.

Number of Attacks: One.

Date of each: April 1925.

Duration: 12 days.

Complications: No.

Any remaining effects: No.

Date of Complete Recovery: After 12 days.

"17. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years for any ailment, serious or not serious.

Name of physician or practitioner: Dr. Schwinn; Address: Wheeling, W. Va.; When Consulted: April, 1925. Dr. Geo. R. Drick; Address: Williamsport, Pa.; When Consulted: December, 1925.

Nature of Complaint: Appendectomy. Annual Physical Examination.

Give full details above under Q. 16:

"18. Have you stated in answer to question 16 all illnesses, diseases, injuries and surgical operations which you have had since childhood? (Ans. Yes or No.) Yes.

"19. Have you stated in answer to question 17 every physician and practitioner consulted during the past five years and dates of consultations? (Ans. Yes or No.) Yes.

"20. (a) Are you in good health? A. Yes.
(b) If not, what is the impairment?
"

Twentieth: The foregoing answers were not true nor complete for the reason that at the time when said questions were asked and answers made, to wit, on the 11th day of February, 1928, the said Carl F. Strochmann was not in good health, but on the contrary had been suffering for a considerable time from inflammation and disease of his sinuses, that in 1918 he had an attack of influenza, and also for the reason that prior thereto, to wit, in 1903, he had suffered from an attack of typhoid fever, in 1904 from an attack of pneumonia, and in 1912 from two separate attacks of rheumatism; that he had at several times consulted physicians and received medical attendance for said sinus trouble, and as hereinafter set forth, said sinus trouble and other complications in connection therewith necessitated further medical attendance as hereinafter more fully set forth, and has disabled and incapacitated the insured from time to time. Said sinus trouble had been of long standing in 1928, dating back to an attack of influenza in 1918, as the plaintiff is informed and expects to prove, the existence of which said sinus trouble of long standing and the influenza referred to were not mentioned in the

answers hereinabove quoted, but were concealed, and have come to the attention and notice of the plaintiff only within the last few weeks.

Twentieth and One-half: In addition to the illnesses, diseases and surgical operation set forth in the nineteenth paragraph of this amended bill, your affiant is informed and believes and expects to be able to prove at the trial of this suit that the defendant, Carl F. Strochmann, prior to the date aforesaid, February 11, 1928, when said questions were asked and answers made, and since childhood, had the following illnesses, diseases, injuries and surgical operations:

1914 Broken ribs, contusions of right kidney, followed by hematuria, in Wheeling, West Virginia;
1916 Concussion of the brain, in Wheeling, West Virginia;
1922 Typhoid-Rheumatism;
1922 Tonsilitis and tonsillectomy, operation in Wheeling, West Virginia;
1923 Influenza, in Wheeling, West Virginia;
1926 Visceroptosis, in Williamsport, Pa.

In addition to medical attendance by Doctors Schwinn and Drick, mentioned in answer to question 17 in the nineteenth paragraph hereof, your affiant is informed and believes and expects to be able to prove at the trial of this suit that the defendant, Carl F. Strochmann, was prescribed for and treated by and he did consult within five years previous to the date aforesaid, February 11, 1928, a physician, to wit, Dr. D. A. MacGregor, at the Wheeling Clinic, Wheeling, West Virginia, on March 24, 1925, for headaches, mental sluggishness and indigestion, and also Dr. A. F. Hardt at various times between June 1, 1925 and February 11,

1928, at Williamsport, Pennsylvania, for nervousness, cramps in stomach and rundown condition.

The foregoing illnesses, diseases, injuries and surgical operation and treatment by physicians were not mentioned in the answers hereinabove quoted but were concealed, and have come to the attention and notice of the plaintiff only within the last few weeks.

Twenty-first: The plaintiff further avers that in the application for the policy of insurance marked Exhibit "G", the defendant, Carl F. Stroehmann, in his application therefor, a copy of which is attached hereto as Exhibit "F", made the following agreement, as by reference thereto will more fully and at large appear:

> "This application is made to The Mutual Life Insurance Company of New York herein called the Company. All the following statements and answers, and all those that the Insured makes to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. The Insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the Insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless

and until the first premium shall have been paid during the Insured's continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided."

At the bottom of the medical examination the insured certified that his statements to the medical examiner contained in said application were true and correct, as follows:

"I certify that each and all of the foregoing statements and answers were read by me and are fully and correctly recorded by the Medical Examiner."

Twenty-second: The plaintiff further avers that in said Exhibit "F" the following statements of the insured to the medical examiner were made in answer to certain questions as follows:

"'16. What illnesses, diseases, injuries and surgical operations have you had since childhood?

Name of disease, etc.: Appendicitomy.
Number of attacks: 1.
Date of Each: 1925.
Duration: 24 days.
Complications: No.
Any remaining effects: No.
Date of Complete Recovery: 1925.

"17. State every physician or practitioner who has prescribed or treated you, or whom you have consulted in the past five years for any ailment, serious or not serious.

Name of Physician or practitioner: Dr. Geo. Drick; Address: Williamsport, Pa.; When consulted: 1929.

Nature of Complaint: Coryza.
Give full details above under Q. 16.

"18. Have you stated in answer to question 16 all illnesses, diseases, injuries and surgical operations which you have had since childhood? (Ans. Yes or No.) Yes.

"19. Have you stated in answer to question 17 every physician and practitioner consulted during the last five years and dates of consultations? (Ans. Yes or No.) Yes.

"20. (a) Are you in good health? A. Yes.
(b) If not, what is the impairment?

. . . . . .

"31. Have you ever been at any asylum, cure, hospital or sanitarium for treatment, observation or diagnosis? A. Appendectomy, 1925.

"32. Have you been under any restriction of diet or any medical or other treatment or medical observation of any kind, within one year for any purpose? A. No."

Twenty-third: The plaintiff avers that the foregoing answers and statements were not true, but that on the contrary, as the defendant well know at the time, were false. The plaintiff avers that in addition to the disease mentioned in answer to question No. 16 and in addition to the medical attention mentioned in answer to question No. 17, and the answers to questions Nos. 18 and 19, that the said Carl F. Stroehmann, defendant, had suffered an attack of influenza in 1918 and had received medical attendance therefor, and that as a result of said influenza the said Carl F. Stroehmann suffered from sinus trouble which increased in severity, and for a period of several years prior to 1930, the date of said application, he had suffered a great deal from

said sinus trouble; that in or about January or February, 1930, he was confined to his bed for about two months; that during the Spring of 1930 he was obliged to go to Germany for medical treatment, and that while there he consulted medical specialists at Berlin and Frankfort, and that he spent a month or two at a sanitarium in the Black Forest region of Germany under medical supervision and attendance. The insured also had other previous ailments as set forth in Paragraph Twentieth.

Twenty-third and One-half: Your affiant is informed and believes and expects to prove at the trial of this suit that in addition to the diseases and medical attention specifically set forth in the twenty-third paragraph of this amended bill and in paragraph 20½, the defendant, Carl F. Stroehmann, prior to June 26, 1930, when the questions set forth in paragraph 22 were asked and the answers made thereto, and since childhood, had a surgical operation at Williamsport Hospital, Williamsport, Pennsylvania, for adhesions on December 4, 1928, and was confined in said hospital from December 4, 1928 to December 19, 1928. In addition to the physician named in answer to question 17, quoted in the twenty-second paragraph hereof, the defendant, Carl F. Stroehmann, consulted and was treated and prescribed for by the following physicians within five years prior to the date aforesaid, June 26, 1930:

Dr. A. F. Hardt, at Williamsport, Pa., on June 1, 1925, and at other times during 1925-1928 treated and prescribed for the said defendant for nervousness, cramps in stomach and rundown condition.

Dr. Frederick B. Little of Norristown, Pa., on October 24, 1929 and on January 1, 1930, treated and prescribed for the said defendant for colds, nervousness and spasms of the larynx.

Dr. George Whalen at Philadelphia, Pa., on February 3, 1931, and at various times prior thereto and within five years prior to June 26, 1930, treated and prescribed for the said defendant for sinus and throat ailments.

And the defendant had other illnesses, diseases, injuries, surgical operations and medical attendance at the times aforesaid with regard to which information has been denied your affiant by informants at the request of the plaintiff. The foregoing illnesses, diseases, injuries and surgical operations and treatment by physicians were not mentioned in the answers hereinabove quoted but were concealed and have come to the attention and notice of the plaintiff only within the last few weeks.

Twenty-fourth: The plaintiff further avers that the said insured's answer to Question No. 20 above set forth, to the effect that he was in good health at the date of said application, was untrue and false to the knowledge of the said insured, in that at that time and for a long time previous, he had been suffering from diseases as hereinabove set forth.

Twenty-fifth: Your Orator further avers that the foregoing questions and answers hereinabove quoted from applications Exhibits "A", "B", "C" and "F", upon which the policies Exhibits "D" and "E" were amended, and upon which policy Exhibit "G" was issued, were false and known to be false and untrue by the said Carl F. Stroehmann at the time the same were made, that the said misrepresentations were and are material to the risk assumed by the plaintiff, and that if the said questions had been answered truthfully and honestly by the said defendant, the said policies of insurance Exhibits "D" and "E" would not have been amended to include the increasing disability bene-

fits, and the policy Exhibit "G" would not have been issued.

Twenty-sixth: Your Orator further avers that the said defendant, Carl F. Stroehmann, well knew at the time he made said false and untrue answers that the same were false and untrue, and that they were made with the fraudulent intent of securing the amendment of the said policies of insurance Exhibits "D" and "E" and the issue of the policy Exhibit "G", with the purpose and intent of defrauding your Orator.

Twenty-seventh: Your Orator further avers that immediately upon ascertaining the true facts with reference to the fraudulent misrepresentations and untrue statements, your Orator has caused to be prepared and filed this amended bill of complaint, and that it intends immediately to tender to the said Carl F. Stroehmann a return in full of the portions of the premiums for said policies of insurance Exhibits "D", "E" and "G", in the sum of Eight Hundred Thirty-four Dollars and Sixty-seven Cents ($834.67) representing the additional premium due because of the disability provisions of said policies, and that it herein and by this amended bill tenders to the said Carl F. Stroehmann a return of said additional premiums as set forth, and avers that it is ready and willing at any time to return said additional premiums, and herewith tenders said payment upon the proper modification of the contracts of insurance as hereinafter prayed for.

Twenty-eighth: Your Orator further avers that the defendant, Carl F. Stroehmann, now claims to be totally disabled and is making demand upon the plaintiff, your Orator, for the payment of disability benefits provided for in said policies of insurance and for a waiver of the premium liability on policy

Exhibit "G", and unless restrained, will bring an action at law upon the said policies for the payment of the said disability provisions notwithstanding the fraudulent misrepresentations which induced the amendment of the policies Exhibits "D" and "E" and the issuance of policy Exhibit "G".

Wherefore, your Orator, being in need of equitable relief and without adequate remedy at law, respectfully prays your Honorable Court:

First: That a subpoena issue in due course, directed to the defendants, ordering and directing them to appear and make answer to the within amended bill of complaint.

Second: That decree be entered by your Honorable Court ordering and decreeing a rescission and cancellation of the provisions for disability benefit provisions in the policies Exhibits "D" and "E", secured as a result of the applications, Exhibits "A", "B" and "C" and known as amended disability provisions, upon a return to the said defendant, Carl F. Strochmann, of the additional premiums paid for said added disability provisions.

Third: That a decree be entered by your Honorable Court ordering and decreeing a rescission and cancellation of the provisions in the policy Exhibit "G" of the disability benefit provisions contained therein, upon a return to the said defendant, Carl F. Strochmann, of the additional amounts in the premiums for said policy covering and paying for said disability benefit provisions.

Fourth: That the defendants be restrained from bringing any action at law or otherwise upon the said policies for the payment of disability benefits until the hearing in this case and final decree therein.

Fifth: For such other and further relief as to

your Honorable Court upon final hearing may appear meet and proper.

And your Orator will ever pray, etc.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
By O'MALLEY, HILL, HARRIS & HARRIS
Its Solicitors.
(Signed) FREDERICK L. ALLEN
of Counsel.

State of New York,
County of New York, ss.:

Curt Felix, being duly sworn according to law, deposes and says that he is Secretary of The Mutual Life Insurance Company of New York, the within named plaintiff, that as such he is duly authorized to make this affidavit on behalf of the said plaintiff, and does so make it; that he has caused an investigation to be made of the facts involved in the foregoing complaint, and that as a result of said investigation of said facts, is informed and verily believes that the facts set forth in the foregoing amended bill of complaint are true and correct, as the said plaintiff expects to prove upon the trial of this case.

CURT FELIX

Sworn to and subscribed before me this 15th day of April, 1935.

James J. Dillon,
(Seal) *Notary Public.*

My commission expires: March 30, 1937.

James J. Dillon, Notary Public, Queens Co., Queens Co. Clerk's No. 1901, Queens Co. Reg. No. 4644, Certificate filed in New York Co., N. Y. County Clerk's No. 113, N. Y. County Rg. No. 7 D 63, Commission expires Mar. 30, 1937.

EXHIBIT A

Form 4258-10M-4-27
Disability Benefits Ed. Jan. 27.

File with Application
Cost Dated 2/2/28
Registrar
Per H

FM 2/21

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK
Head Office,
Nassau, Cedar, William and Liberty Streets.

Request for Change in or Addition of
Disability Benefits

The undersigned, being all parties in interest under Policy No. 2646 105 in the Mutual Life Insurance Company of New York on the life of Carl F. Stroehmann request said Company to change said policy to provide for 1926 Increasing Disability* Benefits in event of Total and Permanent Disability and at the increased rate of premium applicable thereto, in lieu of the provisions, if any, now in said policy for Benefits in event of Total and Permanent Disability, and agree:

1. That the occupation of the Insured is Mgr. Stroehmann Bros and that he is not engaged in any other occupation and does not contemplate engaging in any other occupation except none.

2. That the Insured does not contemplate residing or traveling outside of the continental limits of the United States of America and the Dominion of Canada, except none.

3. That the medical examination made on the 11th day of Feby. 1928 is offered as a consideration

for the change requested and that the statements and answers therein are true, and that the Insured has not consulted any physician, has had no sickness, injury or impairment of health since such date, and is now in good health.

4. That if the above statements as to occupation or travel or the statements or answers in said medical examination shall be in any respect untrue, or if any Disability Benefits shall be claimed and if it shall appear that disability originated before the date of the granting of this request, any disability benefits granted under said policy shall be only those, if any, provided for in said policy before the change herein requested was made.

5. That such change shall not take effect until it has been approved by the Company at its Home Office in New York City nor until the consideration charged therefore has actually been paid to the Company.

Dated at Williamsport State of Pa the 9 day of Feby 1928.

Carl F. Stroehmann
Signature of Insured and others interested.

Witness C. I. Keebler

*Specify fully benefits desired.

26—451

EXHIBIT B

Form 4258-10M-4-27
Disability Benefits Ed. Jan. 27

File with Application
Cost Dated 2/2/28
Registrar

Per H.

FM

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK
Head Office,
Nassau, Cedar, William and Liberty Streets.

Request for Change in or Addition of
Disability Benefits

The undersigned, being all parties in interest under Policy No. 2677 078 in The Mutual Life Insurance Company of New York on the life of Carl F. Strochmann request said Company to change said policy to provide for 1926 Increasing Disability Benefits in event of Total and Permanent Disability and at the increased rate of premium applicable thereto, in lieu of the provisions, if any, now in said policy for Benefits in event of Total and Permanent Disability, and agree:

1. That the occupation of the Insured is Mgr. Strochmann Bros and that he is not engaged in any other occupation and does not contemplate engaging in any other occupation except none.

2. That the Insured does not contemplate residing or traveling outside of the continental limits of the United States of America and the Dominion of Canada, except none.

3. That the medical examination made on the 11th day of Feby 1928 is offered as a consideration for the change requested and that the statements and answers therein are true, and that the Insured has not consulted any physician, has had no sickness, injury or impairment of health since such date, and is now in good health.

4. That if the above statements as to occupation or travel or the statements or answers in said med-

ical examination shall be in any respect untrue, or if any Disability Benefits shall be claimed and if it shall appear that disability originated before the date of the granting of this request, any disability benefits granted under said policy shall be only those, if any, provided for in said policy before the change herein requested was made.

5. That such change shall not take effect until it has been approved by the Company at its Home Office in New York City nor until the consideration charged therefore has actually been paid to the Company.

Dated at Williamsport State of Pa the 9 day of Feby 1928.

Carl F. Stroehmann
Signature of Insured and others interested.

Witness C. I. Keebler

*Specify fully benefits desired.

26—451

EXHIBIT C

All Questions to Be Answered by the Person to Be Insured

(Whenever the word "Insured" is used in this application, it shall be construed as meaning "the person whose life is proposed for insurance.")

This Application is made to The Mutual Life Insurance Company of New York herein called the Company. All the following statements and answers and all those that the Insured makes to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy.

The Insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the Insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; except in case a conditional receipt shall have been issued as hereunder provided.

Feb 6841

Name in full of Insured: Carl F. Stroehmann
Given Name, Middle Name (if any) and Surname

1. Residence of Insured—Street and No.: No., 832; Street, 3rd Ave. Town, City or Village: Williamsport or miles in a Direction from on R. F. D. No. . County: Lycoming. State or Province: Pa. Period: 3 Yrs., 10 Mos. Place of Business of Insured: Williamsport. Former residences: Newark N. J. Period: 1 Yr. Name of firm or employer of Insured: Stroehmann Bros. Present occupation of Insured: Business Mgr & Treas. Nature of business of Insured: Bakery so engaged 3 yrs. 10 mos. Other occupations of Insured are: (If none, state None) none. Former occupations of Insured: (If none, state None). Insured was born at Town or City: Wheeling. State or Country: W Va. on the 8 day of Aug 1896. Age of Insured at nearest birthday: 31 years. Insured

is a Citizen or Subject of (Country): U. S. A. Send all communications to Insured at Williamsport.

2. Except as stated below in (7), The Insured does not contemplate either (a) going to a foreign or tropical country, or (b) changing his occupation.

3. Except as stated below in (7), The Insured has not made, nor does he contemplate making aviation flights or aeronautical ascensions.

4. Except as stated below in (7), No negotiations for other insurance on the life of the Insured, nor any application for reinstatement of insurance on the life of the Insured, are now pending or contemplated.

5. Except as stated below in (7), No application for life insurance on the life of the Insured has ever been declined or postponed by any company or association.

6. The following is all the insurance now in force on the Insured's life: (If none, state None) Name of Company or Association: M. L. of N Y, Pols 2677078 & 2646105. Amount: 5000, 5000.

7. Details re Questions 2, 3, 4 and 5 (If none, state None): 2. No; 3. No; 4. None; 5. None.

8. (a) Amount of insurance applied for $10000; (b) Premiums to be paid annually.

9. Plan of insurance (State fully): Ordinary Life. Answer Yes, No—1. Increasing Disability Benefits: Yes; 2. Level Disability Benefits: √; 3. Double Indemnity Benefit: Yes; 4. Waiver of Premium Benefit: Yes; Disability income if any payable to Insured (Insert Insured or Beneficiary).

10. It is agreed that if the Company is unwilling to issue a policy for plan and amount applied for, this application shall be for such plan and amount as may be issued by the Company.

11. Unless otherwise herein specified policy will be payable to Beneficiary if living, if not living Insured's estate. (a) Name (in full) of Beneficiary. If a corporation give head office and state of incorporation Estate; (b) P. O. Address .....; (c) Relationship to the Insured or Insurable Interest ..... If Endowment state payee at maturity as Endowment .....

12. The privilege of changing the Beneficiary from time to time, provided policy has not been assigned is reserved to the Insured (Insert Insured or Beneficiary).

13. The right, without consent of any other person to loan and surrender values and to dividends and options provided in policy, is reserved to the Insured (Insert Insured or Beneficiary).

14. $..... in cash has been paid to the Soliciting Agent and a conditional receipt No. ....., signed by the Secretary of the Company, and countersigned by the agent has been issued making the insurance in force from this date, provided this application shall be approved.

It is agreed that in the event of the self-destruction of the Insured during the first year following the date of issue of the policy hereby applied for whether sane or insane the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no Agent or other person except the President, Vice-President, a Second Vice-President or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promise respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, modify or discharge any contract

of insurance, or to extend the time for payment of a premium or to waive any lapse or forfeiture or any of the Company's rights or requirements.

Signature in full of Insured
Carl F. Strochmann

Dated at Williamsport Pa on Feby 7 1928.

I have known the Insured for (Stranger) years and saw him sign this application.

C. I. Keebler 2/3 R L Jones 1/3
Soliciting Agent.

This application is made at the instance and request of the undersigned, who, it is agreed, will pay all premiums out of his, her or its funds, and who ratifies the representations, statements, answers and agreements contained in such application and in the statements to Medical Examiner.

.....

Signature in full of person or persons who will pay the premiums

(Foregoing to be executed only when the application is made at the instance and request of some one other than the person to be insured and who will pay the premiums.)

Statements of the Insured to Medical Examiner

These must be recorded in the handwriting of the Medical Examiner, who should satisfy himself that the Insured's statements and answers are full and complete.

15. What is your full name? Carl F. Stroehmann.

16. What illnesses, diseases, injuries and surgical operations have you had since childhood? ... Name of disease, etc.: Appendicitis operation. Number of Attacks: One. Date of each: April, 1925. Duration: 12 days. Complications: No. Any re-

maining effects: No. Date of Complete Recovery: After 12 days.

17. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years for any ailment, serious or not serious. Name of physician or practitioner: Dr. Schwinn, Dr. Geo. R. Drick. Address: Wheeling, W. Va.; Williamsport, Pa. When consulted: April, 1925; December, 1925. Nature of Complaint. Give full details above under Q. 16: Appendectomy; Annual physical examination.

18. Have you stated in answer to question 16 all illnesses, diseases, injuries and surgical operations which you have had since childhood? (Ans. Yes or No): Yes.

19. Have you stated in answer to question 17 every physician and practitioner consulted during the past five years and dates of consultations? (Ans. Yes or No): Yes.

20. (a) Are you in good health? Yes. (b) If not, what is the impairment? .....

21. (a) How much weight have you gained in the past year? No. (b) How much weight have you lost in the past year? No. (c) If any change, state cause: ..... (d) How long has weight remained constant? 5 years.

22. (a) What is your date of birth? Aug. 6, 1896. (b) Is this date or is your age a matter of record, (If so, where?) County Court records.

23. Are you married? Yes.

24. (a) To what extent have you used wine, spirits or malt liquors during the past year? (State amount, kind and how much in any one day at the most.) Moderately—occasional glass of wine. (b) Do you use any of them daily? (If so, state kind and

amount.) No. (c) Have you been intoxicated during the past five years? (State how often and how recently.) No. (d) If a total abstainer, how long have you been so? ..... (e) Have you ever taken cure for alcoholic or drug habit? (If so, give date or dates.) No.

25. (a) Is there any impairment of vision in the right eye? Yes—astigmatism. (b) or in the left eye? Yes—astigmatism. (c) If so, state the cause and the degree of impairment in each eye: Moderate bilateral astigmatism.

26. Have you ever raised or spat blood? No.

27. Have you a rupture or hernia? No.

28. Have you any bodily deformity? No.

29. Have you lost any part of arm or leg? No.

30. Have you any impairment of hearing? No.

31. Have you ever been at any asylum, cure, hospital or sanitarium for treatment, observation or diagnosis? Yes.

32. Have you been under any restriction of diet or any medical or other treatment or medical observation of any kind, within one year for any purpose? Yes.

33. Have you ever changed your residence on account of your health? No.

34. Do you contemplate making any change in your residence? (If so, why?). No.

35. Has any member of your household suffered from tuberculosis within the past two years? (If so, date when last exposed?) No.

36. Has there ever been any suspicion that any of your parents, brothers or sisters ever had tuberculosis, insanity, epilepsy, paralysis or apoplexy? No.

If any of questions 26 to 36 are answered "Yes"

give full details: (Q. 31) Ohio Valley General Hospital for Appendectomy. (Q. 32) Williamsport Hospital 1 day every year for laboratory studies and annual physical examination by Dr. Geo. R. Drick.

37. Family record if living—Father: Age: 61; Condition of health: good. Mother: Age: 56; Condition of health: good. How many brothers living? (If none living, so state) One; Age: 27; Condition of health: good. How many sisters living? (If none living, so state) three; Age: 38, 34, 24; Condition of health: good, good, good. If dead—How many brothers dead? (If none dead, so state) no. How many sisters dead? (If none dead, so state) no. Age of grandparents—Father's father: Dead, 74; Father's mother: Dead, 60; Mother's father: Dead, 72; Mother's mother: Dead, 55.

I certify that each and all of the foregoing statements and answers were read by me and are fully and correctly recorded by the Medical Examiner.

Carl F. Strochmann
Signature in full of the Insured.

Dated at Williamsport State or Province of Pennsylvania the eleventh day of February 1928.
Witness A Rowland Kirch M. D.
25-401A

(Printed in Margin):

Upon request the policy may be antedated for a period not to exceed six months unless prohibited by law.

Medical Examiner's Report

38. (a) How long and how intimately have you known the Insured? Stranger. (b) Give some mark of identification: Appendectomy Scar.

39. General appearance? (Healthy or unhealthy) Healthy.

40. Apparent age? 31 years.
41. Race? (as white, etc.) White.
42. Weight? 160 lbs.
43. Did you weigh Insured on scales? no.
44. Height by measurement? 6 feet ¾ inches.
45. Measurement of chest at full inspiration? 39 inches.
46. Measurement of chest at deep expiration? 34 inches.
47. Measurement of abdomen at level of umbilicus? 27 inches.
48. State the pulse rate? (Count a full minute. If over 90 or under 50 retake.) 84.
49. (a) Is the pulse intermittent? no (b) Is the pulse irregular? no (If answered "yes," give full details.)
50. If the Insured is ruptured, examine the hernia and state: (a) location and size? no.
51. Urinary analysis of specimen voided at this examination. (a) Clear or turbid? (If turbid, cause.) Clear. (b) Gravity? (If under 1010 examine another specimen.) 1.018. (c) Reaction? Acid. (d) Presence of albumin? no. (e) Presence of sugar? no. (f) Do you know that the Insured passed this urine? yes.
52. Do careful inquiry and thorough physical examination show any evidence of past or present disease or functional disturbance of: (a) Brain or nervous system? no. (b) Heart? no. (c) Arteries? no. (d) Respiratory organs? no. (e) Kidneys or other urinary apparatus? no. (f) Digestive organs? no. (g) Liver, gall bladder or other abdominal viscera? no. (h) Rheumatic or gouty nature? no. (i) Syphilitic origin? no. (j) Either eye? (If Myopia, is it severe?) yes. (k) Septic nature in the nose or

mouth? no. (l) Middle ear? (Any discharge?) no. (m) Thyroid, skin or any part of body? no.

53. Was examination of heart and lungs made on other than bare skin? (If so, explain.) no.

54. Was any third person present, contrary to Company's rules, while you were asking the Insured questions? no.

55. Do you know, or suspect, that the Insured ever has, or now uses alcoholic beverages to excess, or any narcotic? no.

56. After reviewing the answers recorded in the Statements to Medical Examiner and in the Medical Examiner's Report, are you satisfied that every question has been answered fully? yes.

57. Do you know of anything in connection with the Insured's physical condition, family history or past health record not already recorded, which would affect his (her) insurability? (If so, give details under "Remarks"). No. Remarks: Moderate bilateral astigmatism—wears glasses for reading and driving automobile.

I certify that I have made this examination of (Fill in name of Insured) Carl F. Stroehmann at Williamsport on this 11th day of February 1928 at 11 A. M. and that the foregoing questions have been put, and the answers of the Insured recorded as stated.

Med'l Dept. No. 3
A Rowland Kirch M. D.
Medical Examiner.

Important notice to Medical Examiner.

This report is the property of the Company and must be delivered or mailed promptly by the Examiner to the Agency manager As Indicated below. It must not be withdrawn or destroyed by anyone. Be-

fore sending the Report to the Manager the Examiner must review it with care and see that every question is fully answered.

For Medical Dept. (Initials illegible)
by Erin.
For Inspector of Risks
Without Special Benefits
With Special Benefits
D. I. G. and Increasing D. B. (Name illegible)
2/17/28
D. I. G. and D. B.
D. I. G. and W. of P.
D. I. G. only
Increasing D. B. only
D. B. only
W. of P. only

EXHIBIT D

Page 1

ORDINARY LIFE

With (1) Total and Permanent Disability Benefits and (2) Double Indemnity for Death by Accident

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK

Number 2,646,405
Face Amount $5000.
Age 23
Annual Premium $112.05

In Consideration of the annual premium of One hundred twelve and 05/100 Dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each Twentieth day of September hereafter until the death of the Insured,

subject to the surrender of this Policy properly receipted,

Promises to pay at the Home Office of the Company in the City of New York, upon receipt at said Home Office of due proof of the death of Carl F. Strochmann, the Insured, of Ashland, County of Boyd, State of Kentucky,

Five Thousand Dollars,

(The Face Amount of this Policy)

to Insured's sister Irene L. Strochmann, the beneficiary, or, if there further be received at said Home Office due proof that such death resulted directly from bodily injury, received after the date of issue of this Policy, independently and exclusively of all other causes, and that such bodily injury was effected solely through external, violent and accidental means, and that such death occurred within sixty days after the date of such bodily injury, promises to pay to said beneficiary, instead of the face amount of this Policy,

Ten Thousand Dollars,

(Double the Face Amount of this Policy, herein called Double Indemnity)

provided, however, that this Double Indemnity shall not be payable in the event of the Insured's death as a result of military or naval service in time of war nor shall it be payable in the event of the Insured's death at any time by his own act, whether sane or insane, nor if such death be caused directly or indirectly, wholly or partly, by riot, insurrection or war or any act incident thereto, nor if such death be a result of participation in aeronautics or submarine operations, nor if such death result from any violation of law by the Insured, or from police duty in any military, naval or police or

ganization, or directly or indirectly from bodily or mental infirmity or disease of any sort. The Company shall have the right and opportunity to examine the body and to make an autopsy, unless prohibited by law.

Death of Beneficiary before Insured: Change of Beneficiary.—If any beneficiary die before the Insured, the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein.

If the interest of a beneficiary shall have vested in the Insured, or if the right to change the beneficiary has been reserved, the Insured, if there be no existing assignment of this Policy, may, from time to time, while this Policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon. Such change shall take effect upon the endorsement of the same on the Policy by the Company.

The right to change the beneficiary has ..... been reserved.

Premiums.—All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by the Treasurer of the Company and countersigned by said agent. A grace of thirty-one days shall be granted for the payment of every premium after the first, during which period of grace the insurance shall continue in force.

When this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy-year in which such death occurs (in-

cluding the overdue premium, if death occurs within the period of grace) shall be deducted from the amount payable thereunder.

Except as herein provided the payment of a premium shall not maintain this Policy in force beyond the date when the next premium is payable. If any premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

Participation:

Annual Dividends.—This Policy shall participate in the surplus of the Company and the proportion of the surplus accruing hereon shall be ascertained and distributed upon payment of the second-year's premium and thereafter at the end of the second and of each subsequent policy-year. At the option of the Insured each such dividend shall be either—

(1) Paid in cash; or,

(2) Used toward the payment of any premium, if the above specified period of grace for such premium payment has not expired and if the remainder of the premium is duly paid; or,

(3) Applied to the purchase of a paid-up participating addition to the Policy (herein called dividend addition); or,

(4) Left to accumulate to the credit of the Policy with compound interest at the rate of three per centum per annum participating in excess interest earnings each year (herein called dividend deposit). Dividend deposits may be drawn on any anniversary of the date of the Policy; if not so drawn, they shall be payable on the surrender, lapse or maturity of the Policy.

Unless the Insured shall elect otherwise within three months after mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions, as per option (3). Such paid-up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1), provided the reserve for such paid-up additions has not been applied to purchase continued insurance or paid-up insurance in accordance with the provisions of the clause entitled "Options on Surrender or Lapse".

Post-mortem Dividend.—On the death of the Insured a cash dividend will be credited to this Policy for the fraction, if any, of the then current policy-year elapsing before such death.

19-7
Ordinary Life
Dis. and D. I. Gen.

Amount of Insurance Payable at Death

Premiums Payable During Life

Total and Permanent Disability Benefits
(Waiver of Premium and Income to Insured;
Insurance not reduced thereby)

Double Indemnity for Death by Accident

Annual Distribution of Surplus

Page 2

Privilege of Change to Other Forms of Policy.—

At any time while no premium is in default and while this Policy is in full force and provided the Insured is then less than fifty-five years of age, this Policy may be exchanged for any form of premium-paying policy issued by the Company at the date of this Policy upon either the Limited Payment Life plan or the Endowment Insurance plan, which contains the same provision for Double Indemnity Benefit that is contained in this Policy but contains neither any provision for Waiver of Premium or other Disability Benefit nor for any other special benefit or feature. No medical re-examination will be required, and the new Policy shall be for the same face amount as this Policy, shall bear the same number and date, shall be written as of the same age of the Insured as this Policy, and shall be at the rate of premium in force for such new Policy at the date of this Policy. Such exchange shall be made upon the written request of the Insured and beneficiary or assignee, if any, and upon the surrender of this Policy, and upon the payment to the Company of a sum equal to the differences between the premiums paid hereon, exclusive of premiums paid for Disability Benefits, and the premiums which would have been paid upon the Policy had it originally been upon the new plan, with interest on such differences from the various due dates to the date of exchange at the rate of six per centum per annum compounded annually. Allowance will be made for any larger dividends on the new plan.

Residence and Travel.—This Policy is free from restrictions as to residence and travel, unless otherwise provided by endorsement hereon.

Occupation.—This Policy is free from restrictions

as to Military or Naval Service except as to "Benefits in the Event of Total and Permanent Disability" as set forth in the clause herein providing for such benefits. As to certain other occupations of the Insured, it is restricted during the first year after its date of issue as stated in the application herefor, copy of which is endorsed hereon or attached hereto, but is free from restriction as to such other occupations after such first year.

Suicide.—The Company shall not be liable hereunder in the event of the Insured's death by his own act, whether sane or insane, during the period of one year after the date of issue of this Policy.

Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premiums.

If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid hereon would have purchased at the correct age.

The Contract.—This Policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the Insured shall avoid or be used in defence to a claim under this Policy unless contained in the written application herefor and a copy of the application is endorsed on or attached to this Policy when issued.

Reserve and Net Single Premiums.—The reserve held for the face amount of this Policy and for any dividend additions hereto and the reserves and the net single premiums mentioned herein shall be com-

puted in accordance with the American Experience Table of Mortality assuming interest at the rate of three per centum per annum.

Options on Surrender or Lapse.—After three full years' premiums shall have been duly paid, and provided there is no premium more than three months in default, the owner may elect one of the following options:

(a) to surrender this Policy for its cash value less any indebtedness to the Company hereon (this balance is hereinafter referred to as the net cash value); or,

(b) to have the insurance continued in force from the date of such default as paid-up non-participating term insurance without Disability or Double Indemnity Benefits, for an amount equal to the face amount of this Policy and any outstanding dividend additions less any indebtedness to the Company hereon; or,

(c) to surrender this Policy for paid-up non-participating life insurance without Disability or Double Indemnity Benefits, payable at the same time and on the same conditions as this Policy.

The cash value under option (a) will be the reserve for the face amount of this Policy and for any dividend additions hereto together with any dividend deposits to the credit hereof, less a surrender charge which, in no case, shall be more than one and one-half per centum of the face amount of this Policy; after premiums have been paid for ten full years or more, there shall be no surrender charge.

The term for which the insurance will be continued under option (b), or the amount of the paid-up life insurance obtainable under option (c), will be such as the net cash value obtainable under op-

tion (a) will purchase at the attained age of the Insured at date of default when applied as a net single premium.

In the event of default in payment of premium, if this Policy shall not, within three months after such default, have been surrendered to the Company, at its Home Office for its cash value as provided in option (a), or for paid-up insurance as provided in option (c), the insurance will be automatically continued as provided in option (b).

Loans.—At any time while this Policy is in force, provided at least three full years' premiums shall have been paid and no premium is in default, the Company will advance, on proper assignment and delivery of this Policy and on the sole security hereof, an amount which, with interest thereon to the end of the current policy-year, shall be equal to, or at the option of the owner less than, the cash value at the end of said year: any existing loan hereon with accrued interest, and any unpaid portion of said current policy year's premium shall be paid out of such advance. Interest on the loan shall be at the rate of six per centum per annum and shall be payable at the end of each policy-year, and this interest, if not paid when due, shall be added to the existing loan and shall bear interest at the same rate. The loan with accrued interest may be repaid to the Company at any time. Failure to repay any such advance or to pay interest shall not avoid this Policy unless the total indebtedness hereon to the Company shall equal or exceed the cash value at the time of such failure, nor until one month after notice shall have been mailed by the Company to the last known address of the Insured and of the Assignee of record, if any, at the Home Office of the

Company, but if, at any time, such indebtedness, together with accrued interest thereon, shall equal or exceed the then cash value of the Policy, the Policy shall become void one month after notice shall have been mailed by the Company to said last known addresses. (If a loan is desired before three full years' premiums have been paid, the unpaid balance of the three full years' premiums may be paid by deduction from the loan when made if the amount which can be loaned is sufficient.)

Any indebtedness to the Company under the Policy shall be deducted in any settlement thereof.

Table of Surrender and Loan Value

The values hereunder (computed in accordance with the above provisions and upon the assumption that premiums have been paid in full for the number of years the "Policy has been in force") apply to a Policy for $1,000. As this Policy is for $5000., the values, i. e. the cash, loan, and paid-up life insurance will be 5 times the amounts stated in the table; the term, i. e. the continued insurance, will be for the period stated irrespective of the face amount of the Policy.

If there be any dividend additions or dividend deposits to the credit of the Policy, or if premiums have been paid for any part of a year beyond the last preceding anniversary, the values and, in certain cases, the term will be increased; if there be any indebtedness on the Policy, the values and the term will be decreased; the figures contained in the table represent the actual amounts available after deduction of the surrender charge, if any, but assuming neither dividend additions, dividend deposits nor indebtedness.

After Policy has Been in Force	*Cash Value **Loan Value	Paid-up Non-Participating Life Insurance	Paid-up Non-Participating Term (Continued) Insurance for	
			Years	Days
3	* 19.69	* 54.43	2	203
4	26.67	72.59	3	174
5	33.86	90.70	4	157
6	41.61	109.68	5	168
7	53.67	139.17	7	37
8	66.02	168.38	8	288
9	78.67	197.30	10	180
10	91.64	225.95	12	68
11	102.40	248.17	13	171
12	113.49	270.29	14	246
13	124.91	292.29	15	281
14	136.66	314.13	16	269
15	148.74	335.79	17	209
16	161.16	357.28	18	101
17	173.92	378.56	18	316
18	187.02	399.62	19	124
19	200.47	420.45	19	261
20	214.27	441.04	19	364
21	228.43	461.38	20	73
22	242.93	481.45	20	120
23	257.78	501.22	20	145
24	272.95	520.67	20	148
25	288.44	539.78	20	133
30	369.89	629.42	19	207

Ordinary Life. Age 23.

Values for later years will be computed upon the above stated basis and will be furnished upon request.

*The cash value provided for in the above table for the end of a policy-year, less interest thereon at the rate of six per centum per annum to the end of such policy-year, can be obtained during such policy-year provided all premiums due prior to the end of such policy-year shall have been duly paid

**The loan value provided for in the above table for the end of a policy-year can be obtained (less interest) during such policy-year as explained in the above clause entitled "Loans".

Reinstatement.—Unless it shall have been surrendered for its cash value, or unless the term for which the insurance has been continued shall have expired, this Policy may be reinstated at any time within three years from date of default in payment of any premium, upon evidence of insurability satisfactory to the Company and upon payment of the arrears of premiums with interest thereon at the rate of five per centum per annum; and, at the option of the Insured, either (a) upon payment in cash to the Company of any indebtedness which existed at said date of default, together with interest thereon as specified in the loan provisions of this Policy; or (b) upon reinstatement of such indebtedness, increased by interest thereon as specified in the loan provisions of this Policy, provided such reinstated increased indebtedness does not exceed the loan value at the date of reinstatement.

Paid-up and Endowment Options.—If at any time the reserve held for the face amount of this Policy and for any dividend additions hereto shall be equal to or greater than the net single premium

at the attained age of the Insured for an amount of Life or Endowment Insurance not less than the face amount of this Policy, the Company, upon written request of the Insured and upon delivery of the Policy, will endorse the Policy as fully paid-up participating Life or Endowment Insurance, as the case may be, without Disability or Double Indemnity Benefits, for such amount and kind as said reserve will then purchase when applied as a net single premium; such paid-up insurance shall be subject to any then existing indebtedness to the Company hereon. Or if said reserve shall equal or exceed the face amount of this Policy, the Company, upon legal surrender hereof, will pay in cash such reserve, less any indebtedness hereon to the Company.

Page 3

Benefits in the Event of Total and Permanent Disability Before Age 60.

When Such Benefits Take Effect.—If the Insured, after payment of premiums for at least one full year, provided all past due premiums have been duly paid, shall before attaining the age of sixty years at nearest birthday and while this Policy is in full force furnish due proof to the Company at its Home Office that he has become totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, or from following any gainful occupation, and that such disability has then existed continuously for not less than sixty days, the Company will grant the following benefits.

Benefits.

1. Waiver of Premium.—The Company will, during the continuance of such disability, waive payment of each premium as it thereafter becomes due, commencing with the first premium due after receipt of said due proof of such disability.

2. Income to Insured.—One year after the anniversary of the date of issue of this Policy next succeeding the receipt of said due proof, the Company will pay to the Insured, if then living and such disability still continue, a sum equal to one-tenth of the face amount of the Policy, (but not including dividend additions) and a like sum on each such anniversary thereafter, if the Insured be then living and such disability still continue.

The face amount of the Policy shall not be decreased because of any premium waived or any income payment made nor shall such waived premium or income payment be deducted in any subsequent settlement of the Policy, and the loan and surrender values will increase each year in the same manner as if each premium had been paid when due instead of being waived.

Proof of Continuance of Disability Required; Recovery from Disability.—Although the proof of total and permanent disability may have been accepted by the Company as satisfactory, the Insured shall at any time thereafter, and from time to time, but not oftener than once a year, on demand, furnish to the Company due proof of the continuance of such disability, and if the Insured shall fail to furnish such proof, or if it shall appear to the Company that the Insured is able to perform any work or follow any occupation whatever for compensation, gain or profit, no further premium shall be

waived and no further income shall be paid.

General Provisions.—The provision for such Disability Benefits shall immediately terminate either, (a) if the written request of the Insured for cancellation thereof be received at the Home Office of the Company together with the Policy for endorsement, or, (b) if the Insured shall at any time, voluntarily or involuntarily, engage in military or naval service in time of war outside the continental limits of the United States of America and the Dominion of Canada.

The additional annual premium of $4.50, in consideration of which these Disability Benefits are granted, is payable for thirty-seven full years or until the prior termination of the provision for these benefits. The premium stated on the face of the Policy includes such additional premium, and the premium payable after the provision for these benefits terminates will be the premium stated on the face of the Policy less the amount of such additional premium.

(The above paragraph stamped):

Cancelled,
New York, Feb 23 1928
Cancelled
William L. Simrell Sec'y.

The entire and irrecoverable loss of the sight of both eyes or the severance of both entire hands or both entire feet or of one entire hand and one entire foot shall be considered total and permanent disability without prejudice to any other cause of disability.

Optional Settlement of Double Indemnity.

If the Double Indemnity Benefit provided for on Page 1 of this Policy becomes payable, the Company

instead of each one thousand dollars of the net single sum payable, will, if election be made as provided for election of Mode of Settlement in the clause herein entitled Modes of Settlement, pay

One Thousand Two Hundred Dollars, payable as follows:

(a) Ten Dollars a month for five years, first payment to be made upon receipt of said proof of the death of the Insured, and

(b) Five Dollars a month for the period of five years next succeeding the five-year period mentioned in (a), and

(c) Two and one-half Dollars a month for the period of ten years next succeeding the five-year period mentioned in (b).

(The payments under (a), (b) and (c) do not terminate at the death of any payee, but are payments certain for the periods mentioned.)

The provisions as to participation, supplementary contract, right to surrender, surrender value, and right to assign contained in the clause herein entitled "Modes of Settlement" which are applicable to Mode of Settlement (2), shall apply to this optional settlement.

Modes of Settlement.—If election be made as hereinafter provided, the net sum payable under this Policy at death of the Insured, provided such net sum be not less than $1,000, will be settled by one of the following methods instead of being then paid in one sum to the person then entitled thereto, hereinafter referred to as the payee: if so specified in the election, the annual instalments provided for under method (2) or method (3) will be paid in equal semi-annual, quarterly or monthly payments

of one-half, one-fourth or one-twelfth of the annual instalment.

(1) By the payment of interest at the rate of three per centum per annum on said net sum, payable at the end of each year during the lifetime of the payee, and by the payment upon the death of the payee of the said net sum together with any accrued interest for the year then current; or,

(2) By the payment of equal annual instalments for a specified number of years, whether the payee lives or dies, the first instalment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum; or,

(3) By the payment (a) of twenty equal annual instalments certain, whether the payee lives or dies, the first annual instalment being payable immediately, and the twentieth annual instalment being payable nineteen years later, and (b) of annual instalments of a like amount thereafter throughout the remaining lifetime of said payee, the first of such annual instalments being payable one year after the twentieth annual instalment certain provided said payee be then alive, the payments terminating with the last annual instalment preceding the death of said payee, in accordance with the following table for each one thousand dollars of said net sum.

Unless otherwise specified in making the election of one of the above modes of settlement the amount payable upon the death of the payee under mode of settlement (1), or any instalments payable after the death of the payee under mode of settlement (2), or any of the twenty equal annual instalments certain which may be payable after the death of the payee under mode of settlement (3), shall be pay-

able to the payee's executors or administrators.

The election of any of the foregoing modes of settlement may be made, (a) prior to the death of the Insured by the Insured and the beneficiary jointly; or, if the right to change the beneficiary has been reserved, by the Insured alone: or (b) upon the death of the Insured, if no prior election shall have been made, by the payee: if the Policy be assigned, the assignee must join in any election: such election shall be made by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon. In event of settlement of this Policy under any of said modes of settlement it shall be surrendered to the Company and a supplementary contract shall be issued providing for the mode of settlement elected and the date of such contract shall be the date of receipt at said Home Office of completed proofs of death.

If the net sum payable under the Policy be payable to two or more persons, modes of settlement (1) and (3) are available only if each such person be entitled to receive a separate share of said net sum, in which case each such share shall be settled by the issuance of a separate supplementary contract; modes of settlement (1) and (3) are not available if the payee be a corporation, a partnership or an association.

If so specified in the written notice making election of one of the foregoing modes of settlement, but not otherwise, the supplementary contract may at any time be surrendered to the Company and the Company will pay for the legal surrender thereof, (a) where mode of settlement (1) has been elected, the said net sum together with interest thereon to

the date of surrender at the rate of three per centum per annum for the fractional part of a year, if any, for which interest shall not have already been paid, (b) where mode of settlement (2) or (3) has been elected, the commuted or then present value computed at three per centum interest, compounded annually, of the then future instalments certain exclusive of participation; but no such surrender and commutation will be made under mode of settlement (3) except after the death of the payee occurring before all of said twenty annual instalments certain shall have become payable. A payee who has not the right to surrender the supplementary contract to the Company shall not have the right to assign or encumber such contract or any part thereof or any instalment accruing thereon.

Such supplementary contract shall participate annually in the excess of interest earnings over three per centum per annum, at the same excess rate each year as is used in the dividend calculations of that year in the case of policies issued in the same year as this Policy, but if settlement be made under mode of settlement (3), only that part of the supplementary contract providing for instalments for the fixed period of twenty years shall participate. Any excess interest shall be paid annually on the anniversary of the date of issue of the supplementary contract and, where the instalments under mode of settlement (2) or (3) are payable in semi-annual, quarterly or monthly payments, such excess interest shall be calculated on the assumption that the instalments are paid annually at the commencement of each supplementary contract year.

Table of Annual Instalments for Each $1,000.

Mode of Settlement (2)

Number of Annual Instalments	Amount of Each Annual Instalment
2	$507 39
3	343 23
4	261 99
5	211 99
6	179 22
7	155 83
8	138 30
9	124 69
10	113 81
11	104 92
12	97 53
13	91 29
14	85 94
15	81 32
16	77 29
17	73 74
18	70 59
19	67 78
20	65 25
25	55 75
30	49 53

Mode of Settlement (3)

Age of Payee at death of Insured	Amount of Each Annual Instalment
10 and under	$39 52
11	39 70
12	39 88
13	40 08
14	40 28
15	40 49

Age of Payee at death of Insured	Amount of Each Annual Instalment
16	40 71
17	40 94
18	41 18
19	41 42
20	41 68
21	41 95
22	42 24
23	42 53
24	42 84
25	43 16
26	43 49
27	43 84
28	44 20
29	44 58
30	44 98
31	45 39
32	45 82
33	46 27
34	46 73
35	47 22
36	47 73
37	48 25
38	48 79
39	49 36
40	49 94
41	50 54
42	51 17
43	51 80
44	52 45
45	53 12
46	53 80
47	54 49

Age of Payee at death of Insured	Amount of Each Annual Instalment
48	55 19
49	55 89
50	56 60
51	57 29
52	57 98
53	58 66
54	59 32
55	59 96
56	60 58
57	61 16
58	61 72
59	62 23
60	62 71
61	63 15
62	63 54
63	63 89
64	64 20
65	64 45
66	64 67
67	64 85
68	64 98
69	65 09
70	65 16
71	65 21
72	65 23
73 and over	65 25

Assignment.—The Company shall not be charged with notice of any assignment of any interest in this Policy until the original assignment or a certified copy thereof has been filed at its said Home Office. The Company assumes no responsibility as to the validity or effect of any assignment.

Notice.—No agent or other person except the President, Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company has power on behalf of the Company to make, modify or discharge this or any contract of insurance, to extend the time for paying a premium, to waive any lapse or forfeiture or any of the Company's rights or requirements, or to bind the Company by making any promise respecting any benefits hereunder or by accepting any representation or information not contained in the written application for this Policy.

In Witness Whereof, the Company has caused this Policy to be executed this Twentieth day of September 1919.

Signed Charles A. Peabody, President.
David F. Houston. President.
(Above signature cancelled)
Signed George C. Keefer Secretary
William L. Simrell Secretary.
(Above signature cancelled)
Countersigned Cancelled. Registrar.

(*Attached Provision*):

Increasing Disability Benefits

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK

If the Insured under Policy No. 2,646,105 in The Mutual Life Insurance Company of New York, to which Policy this provision for Disability Benefits is attached and of which it forms a part, is totally and presumably permanently disabled before age 60, the Company

Will Pay to said Insured
A Monthly Income of Fifty Dollars

during such disability, increasing after five and ten years continuous disability, besides waiving pre-

mium payments under said Policy, all in accordance with the following provisions and conditions.

Total Disability: Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for said Insured to follow a gainful occupation.

Permanent Disability: Total disability shall, during its continuance, be presumed to be permanent;

(a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of said Insured; or,

(b) If such disability has existed continuously for ninety days.

When Benefits become Effective: If, before attaining the age of sixty years and while no premium under said Policy or under this provision for Disability Benefits is in default, and, if said Policy shall be an Endowment Policy, before the end of the endowment period, said Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of said Insured so long as such disability continues.

Benefits: (a) Increasing Income: The Company will pay to said Insured during the continuance of such disability, a monthly disability income of the amount stated above ($10 per $1000 face amount of said Policy), beginning upon receipt of due proof of such disability and increasing after sixty consecutive monthly payments have been made to one and one-half times such amount and after sixty further consecutive monthly payments have

been made to twice such amount of which it shall remain while total and permanent disability continues. If such disability has continued more than one month, said income payments will begin as of the end of the first completed month of such disability instead of on the date of receipt of such proof if due proof is also furnished to the Company that such disability has been continuous since its beginning.

(b) Waiver of Premium: The Company will also, after receipt of such due proof of total and permanent disability, waive payment of each premium under said Policy as it thereafter becomes due during such disability and, if due proof is also furnished to the Company that such disability has been continuous since its beginning, the Company will return any premium due after the beginning of such disability which has been paid during its continuance.

Reinstatement of Policy: If, not later than six months after the due date of any premium in default and provided no previously due premium is also in default and before said Insured has attained the age of sixty years, due proof is received by the Company that said Insured was totally and permanently disabled, as defined above, at the date when such premium in default fell due, and has been continuously so disabled since said due date, said Policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefits shall be the same as if such default had not occurred.

Specified Disabilities: The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands or both feet or one hand and one foot,

will be considered total and permanent disability.

General Provisions: The Company may, before making any disability income payment or waiving any premium, require due proof of the continuance of total and permanent disability, but such proof shall not be required oftener than once a year after such disability has continued for two years. If such proof is not furnished on demand or if it shall appear to the Company that said Insured is no longer totally and permanently disabled, no further disability income payments will be made or premiums waived.

Neither the dividends nor the amount payable in any settlement of said Policy shall be decreased because of Disability Benefits granted.

If there shall be a loan on said Policy and if the monthly disability income is being paid by the Company under this provision, the Company shall automatically apply such part of said income toward the interest payments on such loan as may be necessary to prevent said Policy becoming void under the provisions of the section in said Policy entitled "Loans".

If said Insured shall at any time so recover that the payment of Disability Benefits terminates and later shall furnish due proof that he has again become totally and permanently disabled, Disability Benefits shall be the same in amount and subject to the same conditions as if no prior disability had existed.

If the disability of said Insured shall be the result of insanity, disability income payments shall be payable to the beneficiary under said Policy, if any, instead of to said Insured.

Any disability income payment which may be-

come payable and which is unpaid at the death of said Insured shall be paid to such beneficiary.

Disability Benefits shall not be granted if disability is the result of self-inflicted injury.

This provision for Disability Benefits shall automatically terminate if said Insured shall at any time, voluntarily or involuntarily, engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada.

If requested in writing by said Insured, the Company will terminate this provision for Disability Benefits by endorsement hereon.

Premiums: This provision for Disability Benefits is made in consideration (1) of the statements made by said Insured in the application for this provision for Disability Benefits and to the medical examiner in continuation thereof and (2) of the payment of an additional premium of Nine & 15/100 Dollars on the date hereof and of Sixteen and 70/100 Dollars on each 20th day of September hereafter while premiums under said Policy are payable. The premium provided for in said Policy includes this additional premium and if at any time the method of premium payments under said Policy shall be changed, each premium thereafter payable under said Policy shall include a corresponding additional premium for this provision for Disability Benefits.

If said Insured attains the age of sixty years, or if this provision for Disability Benefits terminates before all of the premiums required by said Policy shall have become payable, the premiums, if any, payable under said Policy after such age or such termination shall be reduced by the additional premium charged for Disability Benefits.

This provision for Disability Benefits shall take effect as of February 23rd 1928.

Dated at New York, N. Y., this 23rd day of February 1928.

Signed David F. Houston President.
David F. Houston. President.
(Above signature cancelled)
Signed William L. Simrell Secretary
William L. Simrell Secretary.
(Above signature cancelled)
Countersigned Cancelled. Registrar.
26-304. 1000-5-30.

Sep 5509
January 1918 Issue.

This Application is made to The Mutual Life Insurance Company of New York. All the following statements and answers, and all those that I make to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. I expressly waive, on behalf of myself and any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided:

1. My name is (in full): Carl F. Stroehmann.

2. (a) My residence and period of residence: Street, W. Carter, County Boyds; Town, City or Village, Ashland; State or Prov., Kentucky; For Period of, yrs. . , mos., 2. (b) My place of business is: 310 W. Winchester St. Ashland, Ky. (c) My P. O. address is: Ashland Ky. (d) My former residences were: Pleasant Valley, Wheeling, W. Va.; For Period of, Life.

3. Date of my birth: Day, 8; Month, Aug.; Year, 1896; Age at last birthday, 23.

4. Place of my birth: Town or City, Wheeling; State or Prov., W. Va.; Country, U. S. A.; Citizen or Subject of, U. S.

5. (a) My present occupation is: (Full details, business or trade and name of firm.) Mgr. Ashland Bakery Ashland Ky. (b) I have been so engaged . . yrs., 2 mos. (c) My other occupations are: None.

6. (a) My former occupations were: Chemist. (b) Period of time so engaged: 1 yrs. . . . mos.

7. I do not contemplate any change of occupation, or becoming connected with any military, naval, aeronautic or aviation organization or service or going to any foreign or tropical countries except: (if none, so state) None.

8. (a) Are you connected with any military, naval or aviation organization or service, officially or otherwise? (Ans. Yes or No.) No. (b) If so, state particulars specifying whether an active member or one in reserve:

9. (a) Name (in full) of the person i. e. beneficiary, to whom the sum insured is to be made payable: Irene L. Stroehmann. Cash & Loan options reserved to insured. (b) Residing in Pleasant Valley, Wheeling W. Va. (c) Relationship or insurable in-

terest (in proposed life) of said beneficiary: Sister. (d) Privilege of changing the beneficiary from time to time, provided policy has not been assigned, is desired: (Ans. Yes or No) Yes. (e) Have you any person wholly dependent on you for support? Ans. (Yes or No.) No.

10. I have the following insurance on my life in other Companies and Associations: Name of Company or Association, None.

11. (a) Amount of insurance applied for: $5,000. (b) Plan, (State fully.) Ordinary Life. (c) Premiums to be paid . . . annually.

12. If the Company consents to grant it, do you desire the policy to provide, in accordance with terms of Company's forms now in use, for General. (a) "Double Indemnity" (a) Yes. (b) "Disability Benefits" (b) Yes. (c) "Waiver of Premium" (c) Yes.

13. No negotiations for other insurance on my life are now pending or contemplated except as follows: (if none, so state) None.

14. I have never made an application nor submitted to an examination for life insurance upon which a policy has not been issued on the plan and premium rate originally applied for, except to the following companies or associations: (if none, so state) None.

15. I have paid $ . . . . in cash to the subscribing Soliciting Agent and received a conditional receipt therefor, signed by the Secretary of the Company, making insurance in force from this date, provided this application shall be approved and policy duly issued.

It is understood and agreed that, during the period of one year following the date of issue of the

Policy of Insurance for which application is hereby made, (a) the risk of death will not be covered by the Policy if such death occur by my own act, whether sane or insane, (b) if I engage in any of the following extra-hazardous occupations or employments: retailing intoxicating liquors, handling electric wires or dynamos, blasting, mining, submarine labor, aviation, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad train or track or in switching or in coupling cars, or on any steam or other vessel, without express written permission by the Company, said policy shall be void. I agree that the policy, if issued, may set forth restrictions on (1) military or naval service or work in connection with warfare, or (2) hazards due to warfare or insurrection outside of the United States of America, and that any such provisions shall be binding upon me and upon any one having any interest in said policy. I agree that no agent or other person except the President, Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company has power on behalf of the Company to make, modify or discharge any contract of insurance, to extend the time for paying a premium, to waive any lapse or forfeiture or any of the Company's rights or requirements, or to bind the Company by making any promise respecting any benefits under any Policy issued hereunder or by accepting any representation or information not contained in this application.

Signature in full of person whose
Life is proposed for insurance
Carl Frederick Stroehmann

Dated at Ashland Ky. on 9-15 1919.

I have known the above named applicant for (just

met) and saw him sign this application.
I have issued Conditional receipt No.....
Howard M Hughes
Soliciting Agent.

(Printed on right hand margin):
The applicant, upon request, may have policy antedated for a period not to exceed six months.

Statements to Medical Examiner.

These must be recorded in the handwriting of the Medical Examiner, who should satisfy himself that the applicant's statements and answers are full and complete.

16. What is your full name? Carl Frederick Stroehmann.

17. What illnesses, diseases, injuries or surgical operations have you had since childhood? Name of diseases, etc., Typhoid fever; Number of attacks, One; Date of each, 1903; Duration, Short; Severity, Moderate; Results, Recovery; Date of complete recovery, 1903. Name of disease, etc., Pneumonia; Number of attacks, One; Date of each, 1904; Duration, Short; Severity, Moderate; Results, Recovery; Date of complete recovery, 1903. Name of disease, etc., Rheumatism; Number of attacks, Two; Date of each, 1912; Duration, Ten weeks; Severity, Moderate; Results, Recovery; Date of complete recovery, 1912. Name of disease, etc., Injury to back (foot-ball); Number of attacks, One; Date of each, 1915; Duration, 2 or 3 weeks; Severity, Severe pain; Results, Recovery; Date of complete recovery, 1915.

18. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years. Name of physician

or practitioner, Drs. Truschel & Schwinn; Address, Schmulbach Bldg., Wheeling W. Va.; When consulted, 1915; Nature of complaint. Give full details above under Q. 17, Injury to back. Name of physician or practitioner, Dr. Sylvester; Address, Somerville, Mass.; When consulted, 1918; Nature of complaint. Give full details above under Q. 17. Fracture of lower jaw while playing foot-ball—four weeks—complete recovery—no disability present.

19. Have you stated in answer to question 17 all illnesses, diseases, injuries or surgical operations which you have had since childhood? (Ans. Yes or No.) Yes.

20. Have you stated in answer to question 18 every physician and practitioner consulted during the past five years and dates of consultation? (Ans. Yes or No.) Yes.

21. (a) Are you in good health? Yes. (b) If not, what is the impairment? None.

22. (a) How much weight have you gained in the past year? None. (b) How much weight have you lost in the past year? None. (c) If any change, state cause, None.

23. (a) What is your date of birth? August 8, 1896. (b) Is this date or is your age a matter of record? Yes. (c) If so, where? State House, Wheeling W. Va.

24. Are you married? No.

25. Are you now or have you ever been engaged in any way in the sale or manufacture of beer, wine or other intoxicating liquors? (Ans. Yes or No) No.

26. (a) Have you used wine, spirits or malt liquors during the past year? Yes, beer and light wine. (b) If so, what has been your daily average in past year? Three glasses of beer. (c) How much

have you used in any one day at the most? Three glasses of beer. (d) Have you been intoxicated during the past five years? No. (e) Have you ever taken treatment for alcoholic or drug habit? No. (f) If a total abstainer, how long have you been so?

If any of the questions 27 to 36 below are answered Yes, give details in space adjacent.

27. Have you ever raised or spat blood? No.

28. Have you a rupture or hernia? No.

29. Have you any bodily deformity? No.

30. Have you lost any part of arm or leg? No.

31. Have you any impairment of sight or hearing? No.

32. Have you ever been under treatment at any asylum, cure, hospital, or sanitarium? No.

33. Have you ever changed your residence on account of your health? No.

34. Do you contemplate making any change in your residence? No.

35. Has any member of your household suffered from tuberculosis or consumption during the past year? No.

36. Has there ever been any suspicion that any of your parents, brothers or sisters ever had tuberculosis or consumption, cancer, insanity, epilepsy, paralysis or apoplexy? No.

37. Family record of Applicant: Father—Living; Age, 58; Health, Good. Mother—Living; Age, 51; Health, Good. Age of father's father, if living ; If not, age at death? 80. Age of father's mother, if living? ; If not, age at death? 65. Age of mother's father, if living? ; If not, age at death? 80. Age of mother's mother, if living? : If not, age at death? 55 to 60. Brothers—Number

living (If none, so state), One; Number dead (If none, so state), None; Living—Age, 18; Health, Good. Sisters—Number living (If none, so state), Three; Number dead (If none, so state), None. Living—Age, 35, 28, 13; Health, Good, Good, Good.

I certify that each and all of the foregoing statements and answers were read by me and are fully and correctly recorded by the Medical Examiner.

Carl Frederick Stroehmann
Signature in full of person examined.

Dated at Ashland State of Kentucky the 15th day of September 1919.

Witness:
J. M. Salmon M. D.

The beneficiary is changed to the Insured's wife,
Mildred Stroehmann
The right to revoke this designation of beneficiary is reserved to the insured.

(Signature cancelled)
Secretary.

New York, March 12, 1920.

The beneficiary is changed to Northern Central Trust Company, Williamsport, Pa. as trustee, or its successor trustee, under an agreement of trust dated October 27, 1926 made by and between the Insured Carl F. Stroehmann and the said Northern Central Trust Company.

The right to revoke this designation of beneficiary is reserved to the Insured.

(Signature cancelled)
Secretary.

New York, N. Y. December 10, 1926.

It is understood and agreed that The Mutual Life Insurance Company of New York shall not be responsible for any failure of the said trustee to perform its duties as trustee, nor for the application or disposition of any moneys paid to the said trustee, and payment to the said trustee shall fully discharge The Mutual Life Insurance Company of New York for the amount so paid.

The Mutual Life Insurance
Company of New York,
(Signature cancelled)
Secretary.

New York, N. Y. December 10, 1926.
32-506

The beneficiary is changed to Lycoming Trust Company, Williamsport, Pa., as trustee, or its successor trustee, under an agreement of trust dated February 4, 1927 made by and between the Insured Carl F. Stroehmann and the said Lycoming Trust Company.

The right to revoke this designation of beneficiary is reserved to the Insured.

(Signature cancelled)
Secretary.

New York, N. Y. February 24, 1927.

It is understood and agreed that The Mutual Life Insurance Company of New York shall not be responsible for any failure of the said trustee to perform its duties as trustee, nor for the application or disposition of any moneys paid to the said trustee, and payment to the said trustee shall fully dis-

charge The Mutual Life Insurance Company of New York for the amount so paid.

The Mutual Life Insurance
Company of New York,
(Signature cancelled)
Secretary.

New York, N. Y. February 24, 1927.
32-506

Page 4

The Insured has reserved to himself the right to exercise the following privileges accruing under the terms and conditions of this policy, namely: to surrender this policy for its cash value, and to secure loans from the Company on this policy and to assign the same as collateral security for such loans.

The Mutual Life Insurance
Company of New York,
Signed George C. Keefer Secretary.
(Signature cancelled)

New York, N. Y., September 20, 1919.
14-107 Secretary

The clause in this policy entitled "Benefits in the Event of Total and Permanent disability before Age 60" has been cancelled as of this date and the rider entitled Increasing Disability Benefits has been substituted therefor.

The Mutual Life Insurance
Company of New York,
(Signature cancelled)

New York, N. Y., February 23, 1928.
26-517 D. B. Secretary.

Premiums hereafter payable have been changed to $124.25 annually which amount includes the ad-

ditional premium, or premiums, stated in the rider, or riders, attached to this policy bearing the same date at this endorsement or a prior date, and remaining in full force.

The Mutual Life Insurance
Company of New York,
(Signature cancelled)
Secretary.

New York, N. Y., February 23, 1928.
26-516

10**G
Life.—Dis. and D. I. Gen.
January, 1919.
Annual Dividend
ORDINARY LIFE POLICY
With Total and Permanent Disability Benefits
and
Double Indemnity for Death by Accident
No. 2,646,105
THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK
Insurance on the Life of
Carl F. Stroehmann
Amount, $5000.
Date, September 20th 1919
Term of Life.
Annual Premium, $124.25 Payable for Life.
1000-6-31

EXHIBIT E

Page 1

ORDINARY LIFE

With (1) Total and Permanent Disability Benefits and (2) Double Indemnity for Death by Accident

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK
Number 2,677,078
Face Amount $5000.
Age 23
Annual Premium $112.05

In Consideration of the ..... annual premium of One hundred twelve and 05/100 Dollars, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each Ninth day of December hereafter until the death of the Insured, subject to the surrender of this Policy properly receipted,

Promises to pay at the Home Office of the Company in the City of New York, upon receipt at said Home Office of due proof of the death of Carl F. Stroehmann, the Insured, of Ashland, County of Boyd, State of Kentucky,

Five Thousand ..... Dollars,
(The Face Amount of this Policy)

to Insured's sister Irene L. Stroehmann, the beneficiary, or, if there further be received at said Home Office, due proof that such death resulted directly from bodily injury, received after the date of issue of this Policy, independently and exclusively of all other causes, and that such bodily injury was effected solely through external, violent and accidental means, and that such death occurred within sixty days after the date of such bodily injury, promises to pay to said beneficiary, instead of the face amount of this Policy,

Ten Thousand ..... Dollars,
(Double the Face Amount of this Policy, herein called Double Indemnity)

provided, however, that this Double Indemnity shall

not be payable in the event of the Insured's death as a result of military or naval service in time of war nor shall it be payable in the event of the Insured's death at any time by his own act, whether sane or insane, nor if such death be caused directly or indirectly, wholly or partly, by riot, insurrection or war or any act incident thereto, nor if such death be a result of participation in aeronautics or submarine operations, nor if such death result from any violation of law by the Insured, or from police duty in any military, naval or police organization, or directly or indirectly from bodily or mental infirmity or disease of any sort. The Company shall have the right and opportunity to examine the body and to make an autopsy, unless prohibited by law.

Death of Beneficiary before Insured: Change of Beneficiary.—If any beneficiary die before the Insured, the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein.

If the interest of a beneficiary shall have vested in the Insured, or if the right to change the beneficiary has been reserved, the Insured, if there be no existing assignment of this Policy, may, from time to time, while this Policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement thereon. Such change shall take effect upon the endorsement of the same on the Policy by the Company.

The right to change the beneficiary has ..... been reserved.

Premiums.—All premiums are payable in advance at said Home Office or to any agent of the Company

upon delivery, on or before date due, of a receipt signed by the Treasurer of the Company and countersigned by said agent. A grace of thirty-one days shall be granted for the payment of every premium after the first, during which period of grace the insurance shall continue in force.

When this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy-year in which such death occurs (including the overdue premium, if death occurs within the period of grace) shall be deducted from the amount payable thereunder.

Except as herein provided the payment of a premium shall not maintain this Policy in force beyond the date when the next premium is payable. If any premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

Participation:

Annual Dividends.—This Policy shall participate in the surplus of the Company and the proportion of the surplus accruing hereon shall be ascertained and distributed upon payment of the second year's premium and thereafter at the end of the second and of each subsequent policy-year. At the option of the Insured each such dividend shall be either—

(1) Paid in cash; or,

(2) Used toward the payment of any premium, if the above specified period of grace for such premium payment has not expired and if the remainder of the premium is duly paid; or,

(3) Applied to the purchase of a paid-up par-

ticipating addition to the Policy (herein called dividend addition); or,

(4) Left to accumulate to the credit of the Policy with compound interest at the rate of three per centum per annum participating in excess interest earnings each year (herein called dividend deposit). Dividend deposits may be drawn on any anniversary of the date of the Policy; if not so drawn, they shall be payable on the surrender, lapse or maturity of the Policy.

Unless the Insured shall elect otherwise within three months after mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions, as per option (3). Such paid-up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1), provided the reserve for such paid-up additions has not been applied to purchase continued insurance or paid-up insurance in accordance with the provisions of the clause entitled "Options on Surrender or Lapse".

Post-mortem Dividend.—On the death of the Insured a cash dividend will be credited to this Policy for the fraction, if any, of the then current policy-year elapsing before such death.

19-7
Ordinary Life
Dis. and D. I. Gen.

Amount of Insurance Payable at Death

Premiums Payable During Life

Total and Permanent Disability Benefits

(Waiver of Premium and Income to Insured; Insurance not reduced thereby)

Double Indemnity for Death by Accident

Annual Distribution of Surplus

Page 2

Privilege of Change to Other Forms of Policy.—At any time while no premium is in default and while this Policy is in full force and provided the Insured is then less than fifty-five years of age, this Policy may be exchanged for any form of premium-paying policy issued by the Company at the date of this Policy upon either the Limited Payment Life plan or the Endowment Insurance plan, which contains the same provision for Double Indemnity Benefit that is contained in this Policy but contains neither any provision for Waiver of Premium or other Disability Benefit nor for any other special benefit or feature. No medical re-examination will be required, and the new Policy shall be for the same face amount as this Policy, shall bear the same number and date, shall be written as of the same age of the Insured as this Policy, and shall be at the rate of premium in force for such new Policy at the date of this Policy. Such exchange shall be made upon the written request of the Insured and beneficiary or assignee, if any, and upon the surrender of this Policy, and upon the payment to the Company of a sum equal to the differences between the premiums paid hereon, exclusive of premiums paid for Disability Benefits, and the premiums which would have been paid upon the Policy had it originally been upon the new plan, with interest on such differences from the various due dates to the date

of exchange at the rate of six per centum per annum compounded annually. Allowance will be made for any larger dividends on the new plan.

Residence and Travel.—This Policy is free from restrictions as to residence and travel, unless otherwise provided by endorsement hereon.

Occupation.—This Policy is free from restrictions as to Military or Naval Service except as to "Benefits in the Event of Total and Permanent Disability" as set forth in the clause herein providing for such benefits. As to certain other occupations of the Insured, it is restricted during the first year after its date of issue as stated in the application herefor, copy of which is endorsed hereon or attached hereto, but is free from restriction as to such other occupations after such first year.

Suicide.—The Company shall not be liable hereunder in the event of the Insured's death by his own act, whether sane or insane, during the period of one year after the date of issue of this Policy.

Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premiums.

If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid hereon would have purchased at the correct age.

The Contract.—This Policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the Insured shall avoid or be used in defence to a claim under this Policy unless con-

tained in the written application herefor and a copy of the application is endorsed on or attached to this Policy when issued.

Reserve and Net Single Premiums.—The reserve held for the face amount of this Policy and for any dividend additions hereto and the reserves and the net single premiums mentioned herein shall be computed in accordance with the American Experience Table of Mortality assuming interest at the rate of three per centum per annum.

Options on Surrender or Lapse.—After three full years' premiums shall have been duly paid, and provided there is no premium more than three months in default, the owner may elect one of the following options:

(a) to surrender this Policy for its cash value less any indebtedness to the Company hereon (this balance is hereinafter referred to as the net cash value); or,

(b) to have the insurance continued in force from the date of such default as paid-up non-participating term insurance without Disability or Double Indemnity Benefits, for an amount equal to the face amount of this Policy and any outstanding dividend additions less any indebtedness to the Company hereon; or,

(c) to surrender this Policy for paid-up non-participating life insurance without Disability or Double Indemnity Benefits, payable at the same time and on the same conditions as this Policy.

The cash value under option (a) will be the reserve for the face amount of this Policy and for any dividend additions hereto together with any dividend deposits to the credit hereof, less a surrender charge which, in no case, shall be more than one

and one-half per centum of the face amount of this Policy: after premiums have been paid for ten full years or more, there shall be no surrender charge.

The term for which the insurance will be continued under option (b), or the amount of the paid-up life insurance obtainable under option (c), will be such as the net cash value obtainable under option (a) will purchase at the attained age of the Insured at date of default when applied as a net single premium.

In the event of default in payment of premium, if this Policy shall not, within three months after such default, have been surrendered to the Company at its Home Office for its cash value as provided in option (a), or for paid-up insurance as provided in option (c), the insurance will be automatically continued as provided in option (b).

Loans.—At any time while this Policy is in force, provided at least three full years' premiums shall have been paid and no premium is in default, the Company will advance, on proper assignment and delivery of this Policy and on the sole security hereof, an amount which, with interest thereon to the end of the current policy-year, shall be equal to, or at the option of the owner less than, the cash value at the end of said year: any existing loan hereon with accrued interest, and any unpaid portion of said current policy year's premium shall be paid out of such advance. Interest on the loan shall be at the rate of six per centum per annum and shall be payable at the end of each policy-year, and this interest, if not paid when due, shall be added to the existing loan and shall bear interest at the same rate. The loan with accrued interest may be repaid to the Company at any time. Failure to repay

any such advance or to pay interest shall not avoid this Policy unless the total indebtedness hereon to the Company shall equal or exceed the cash value at the time of such failure, nor until one month after notice shall have been mailed by the Company to the last known address of the Insured and of the Assignee of record, if any, at the Home Office of the Company, but if, at any time, such indebtedness, together with accrued interest thereon, shall equal or exceed the then cash value of the Policy, the Policy shall become void one month after notice shall have been mailed by the Company to said last known addresses. (If a loan is desired before three full years' premiums have been paid, the unpaid balance of the three full years' premiums may be paid by deduction from the loan when made if the amount which can be loaned is sufficient.)

Any indebtedness to the Company under the Policy shall be deducted in any settlement thereof.

Table of Surrender and Loan Values.

The values hereunder (computed in accordance with the above provisions and upon the assumption that premiums have been paid in full for the number of years the "Policy has been in force") apply to a Policy for $1,000. As this Policy is for $5000., the values, i. e. the cash, loan, and paid-up life insurance will be 5 times the amounts stated in the table; the term, i. e. the continued insurance, will be for the period stated irrespective of the face amount of the Policy.

If there be any dividend additions or dividend deposits to the credit of the Policy, or if premiums have been paid for any part of a year beyond the last preceding anniversary, the values and, in certain cases, the term will be increased; if there be

any indebtedness on the Policy, the values and the term will be decreased; the figures contained in the table represent the actual amounts available after deduction of the surrender charge, if any, but assuming neither dividend additions, dividend deposits nor indebtedness.

After Policy has Been in Force	*Cash Value **Loan Value	Paid-up Non-Participating Life Insurance	Paid-up Non-Participating Term ((Continued) Insurance for	
			Years	Days
3	$ 19.69	$ 54.43	2	203
4	26.67	72.59	3	174
5	33.86	90.70	4	157
6	41.61	109.68	5	168
7	53.67	139.17	7	37
8	66.02	168.38	8	288
9	78.67	197.30	10	180
10	91.64	225.95	12	68
11	102.40	248.17	13	171
12	113.49	270.29	14	246
13	124.91	292.29	15	281
14	136.66	314.13	16	269
15	148.74	335.79	17	209
16	161.16	357.28	18	101
17	173.92	378.56	18	316
18	187.02	399.62	19	124
19	200.47	420.45	19	261
20	214.27	441.04	19	364
21	228.43	461.38	20	73
22	242.93	481.45	20	120

23	257.78	501.22	20	145
24	272.95	520.67	20	148
25	288.44	539.78	20	133
30	369.89	629.42	19	207

Ordinary Life. Age 23.

Values for later years will be computed upon the above stated basis and will be furnished upon request.

*The cash value provided for in the above table for the end of a policy-year, less interest thereon at the rate of six per centum per annum to the end of such policy-year, can be obtained during such policy-year provided all premiums due prior to the end of such policy-year shall have been duly paid.

**The loan value provided for in the above table for the end of a policy-year can be obtained (less interest) during such policy-year as explained in the above clause entitled "Loans".

Reinstatement.—Unless it shall have been surrendered for its cash value, or unless the term for which the insurance has been continued shall have expired, this Policy may be reinstated at any time within three years from date of default in payment of any premium, upon evidence of insurability satisfactory to the Company and upon payment of the arrears of premiums with interest thereon at the rate of five per centum per annum; and, at the option of the Insured, either (a) upon payment in cash to the Company of any indebtedness which existed at said date of default, together with interest thereon as specified in the loan provisions of this Policy, or (b) upon reinstatement of such indebtedness, increased by interest thereon as specified in the loan

provisions of this Policy, provided such reinstated increased indebtedness does not exceed the loan value at the date of reinstatement.

Paid-up and Endowment Options.—If at any time the reserve held for the face amount of this Policy and for any dividend additions hereto shall be equal to or greater than the net single premium at the attained age of the Insured for an amount of Life or Endowment Insurance not less than the face amount of this Policy, the Company, upon written request of the Insured and upon delivery of the Policy, will endorse the Policy as fully paid-up participating Life or Endowment Insurance, as the case may be, without disability or double Indemnity Benefits, for such amount and kind as said reserve will then purchase when applied as a net single premium; such paid-up insurance shall be subject to any then existing indebtedness to the Company hereon. Or if said reserve shall equal or exceed the face amount of this Policy, the Company, upon legal surrender hereof, will pay in cash such reserve, less any indebtedness hereon to the Company.

Page 3

Benefits in the Event of Total and Permanent Disability Before Age 60.

When Such Benefits Take Effect.—If the Insured, after payment of premiums for at least one full year, provided all past due premiums have been duly paid, shall before attaining the age of sixty years at nearest birthday and while this Policy is in full force furnish due proof to the Company at its Home Office that he has become totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any

work for compensation, gain or profit, or from following any gainful occupation, and that such disability has then existed continuously for not less than sixty days, the Company will grant the following benefits.

Benefits.

1. Waiver of Premium.—The Company will, during the continuance of such disability, waive payment of each premium as it thereafter becomes due, commencing with the first premium due after receipt of said due proof of such disability.

2. Income to Insured.—One year after the anniversary of the date of issue of this Policy next succeeding the receipt of said due proof, the Company will pay to the Insured, if then living and such disability still continue, a sum equal to one-tenth of the face amount of the Policy, (but not including dividend additions) and a like sum on each such anniversary thereafter, if the Insured be then living and such disability still continue.

The face amount of the Policy shall not be decreased because of any premium waived or any income payment made nor shall such waived premium or income payment be deducted in any subsequent settlement of the Policy, and the loan and surrender values will increase each year in the same manner as if each premium had been paid when due instead of being waived.

Proof of Continuance of Disability Required; Recovery from Disability.—Although the proof of total and permanent disability may have been accepted by the Company as satisfactory, the Insured shall at any time thereafter, and from time to time, but not oftener than once a year, on demand, furnish to the Company due proof of the continuance

of such disability, and if the Insured shall fail to furnish such proof, or if it shall appear to the Company that the Insured is able to perform any work or follow any occupation whatever for compensation, gain or profit, no further premium shall be waived and no further income shall be paid.

General Provisions.—The provision for such Disability Benefits shall immediately terminate either, (a) if the written request of the Insured for cancellation thereof be received at the Home Office of the Company together with the Policy for endorsement, or, (b) if the Insured shall at any time, voluntarily or involuntarily, engage in military or naval service in time of war outside the continental limits of the United States of America and the Dominion of Canada.

The additional annual premium of $4.50, in consideration of which these Disability Benefits are granted, is payable for thirty-seven full years or until the prior termination of the provision for these benefits. The premium stated on the face of the Policy includes such additional premium, and the premium payable after the provision for these benefits terminates will be the premium stated on the face of the Policy less the amount of such additional premium.

(The above paragraph stamped):
Cancelled,
New York, Feb 23 1928
(Signature cancelled)
Secy.

The entire and irrecoverable loss of the sight of both eyes or the severance of both entire hands or both entire feet or of one entire hand and one entire foot shall be considered total and permanent

disability without prejudice to any other cause of disability.

Optional Settlement of Double Indemnity.

If the Double Indemnity Benefit provided for on Page 1 of this Policy becomes payable, the Company instead of each one thousand dollars of the net single sum payable, will, if election be made as provided for election of Mode of Settlement in the clause herein entitled Modes of Settlement, pay

One Thousand Two Hundred Dollars, payable as follows:

(a) Ten Dollars a month for five years, first payment to be made upon receipt of said proof of the death of the Insured, and

(b) Five Dollars a month for the period of five years next succeeding the five-year period mentioned in (a), and

(c) Two and one-half Dollars a month for the period of ten years next succeeding the five-year period mentioned in (b).

(The payments under (a), (b) and (c) do not terminate at the death of any payee, but are payments certain for the periods mentioned.)

The provisions as to participation, supplementary contract, right to surrender, surrender value, and right to assign contained in the clause herein entitled "Modes of Settlement" which are applicable to Mode of Settlement (2) shall apply to this optional settlement.

Modes of Settlement.—If election be made as hereinafter provided, the net sum payable under this Policy at death of the Insured, provided such net sum be not less than $1,000, will be settled by one of the following methods instead of being then paid in one sum to the person then entitled thereto,

hereinafter referred to as the payee: if so specified in the election, the annual instalments provided for under method (2) or method (3) will be paid in equal semi-annual, quarterly or monthly payments of one-half, one-fourth or one-twelfth of the annual instalment.

(1) By the payment of interest at the rate of three per centum per annum on said net sum, payable at the end of each year during the lifetime of the payee, and by the payment upon the death of the payee of the said net sum together with any accrued interest for the year then current; or,

(2) By the payment of equal annual instalments for a specified number of years, whether the payee lives or dies, the first instalment being payable immediately, in accordance with the following table for each one thousand dollars of said net sum; or,

(3) By the payment (a) of twenty equal annual instalments certain, whether the payee lives or dies, the first annual instalment being payable immediately, and the twentieth annual instalment being payable nineteen years later, and (b) of annual instalments of a like amount thereafter throughout the remaining lifetime of said payee, the first of such annual instalments being payable one year after the twentieth annual instalment certain provided said payee be then alive, the payments terminating with the last annual instalment preceding the death of said payee, in accordance with the following table for each one thousand dollars of said net sum.

Unless otherwise specified in making the election of one of the above modes of settlement the amount payable upon the death of the payee under mode of settlement (1), or any instalments payable after

the death of the payee under mode of settlement (2), or any of the twenty equal annual instalments certain which may be payable after the death of the payee under mode of settlement (3), shall be payable to the payee's executors or administrators.

The election of any of the foregoing modes of settlement may be made, (a) prior to the death of the Insured by the Insured and the beneficiary jointly; or, if the right to change the beneficiary has been reserved, by the Insured alone: or, (b) upon the death of the Insured, if no prior election shall have been made, by the payee: if the Policy be assigned, the assignee must join in any election: such election shall be made by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon. In event of settlement of this Policy under any of said modes of settlement it shall be surrendered to the Company and a supplementary contract shall be issued providing for the mode of settlement elected and the date of such contract shall be the date of receipt at said Home Office of completed proofs of death.

If the net sum payable under the Policy be payable to two or more persons, modes of settlement (1) and (3) are available only if each such person be entitled to receive a separate share of said net sum, in which case each such share shall be settled by the issuance of a separate supplementary contract; modes of settlement (1) and (3) are not available if the payee be a corporation, a partnership or an association.

If so specified in the written notice making election of one of the foregoing modes of settlement, but not otherwise, the supplementary contract may at any time be surrendered to the Company and the

Company will pay for the legal surrender thereof, (a) where mode of settlement (1) has been elected, the said net sum together with interest thereon to the date of surrender at the rate of three per centum per annum for the fractional part of a year, if any, for which interest shall not have already been paid, (b) where mode of settlement (2) or (3) has been elected, the commuted or then present value computed at three per centum interest, compounded annually, of the then future instalments certain exclusive of participation; but no such surrender and commutation will be made under mode of settlement (3) except after the death of the payee occurring before all of said twenty annual instalments certain shall have become payable. A payee who has not the right to surrender the supplementary contract to the Company shall not have the right to assign or encumber such contract or any part thereof or any instalment accruing thereon.

Such supplementary contract shall participate annually in the excess of interest earnings over three per centum per annum, at the same excess rate each year as is used in the dividend calculations of that year in the case of policies issued in the same year as this Policy, but if settlement be made under mode of settlement (3), only that part of the supplementary contract providing for instalments for the fixed period of twenty years shall participate. Any excess interest shall be paid annually on the anniversary of the date of issue of the supplementary contract and, where the instalments under mode of settlement (2) or (3) are payable in semi-annual, quarterly or monthly payments, such excess interest shall be calculated on the assumption that the instalments are paid annually at the commencement of each supplementary contract year.

Mode of Settlement (2)

Number of Annual Instalments	Amount of Each Annual Instalment
2	$507 39
3	343 23
4	261 99
5	211 99
6	179 22
7	155 83
8	138 30
9	124 69
10	113 81
11	104 92
12	97 53
13	91 29
14	85 94
15	81 32
16	77 29
17	73 74
18	70 59
19	67 78
20	65 25
25	55 75
30	49 53

Mode of Settlement (3)

Age of Payee at death of Insured	Amount of Each Annual Instalment
10 and under	$39 52
11	39 70
12	39 88
13	40 08
14	40 28
15	40 49

Age of Payee at death of Insured	Amount of Each Annual Instalment
16	40 71
17	40 94
18	41 18
19	41 42
20	41 68
21	41 95
22	42 24
23	42 53
24	42 84
25	43 16
26	43 49
27	43 84
28	44 20
29	44 58
30	44 98
31	45 39
32	45 82
33	46 27
34	46 73
35	47 22
36	47 73
37	48 25
38	48 79
39	49 36
40	49 94
41	50 54
42	51 17
43	51 80
44	52 45
45	53 12
46	53 80
47	54 49

Age of Payee at death of Insured	Amount of Each Annual Instalment
48	55 19
49	55 89
50	56 60
51	57 29
52	57 98
53	58 66
54	59 32
55	59 96
56	60 58
57	61 16
58	61 72
59	62 23
60	62 71
61	63 15
62	63 54
63	63 89
64	64 20
65	64 45
66	64 67
67	64 85
68	64 98
69	65 09
70	65 16
71	65 21
72	65 23
73 and over	65 25

Assignment.—The Company shall not be charged with notice of any assignment of any interest in this Policy until the original assignment or a certified copy thereof has been filed at its said Home Office. The Company assumes no responsibility as to the validity or effect of any assignment.

Notice.—No agent or other person except the President, Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company has power on behalf of the Company to make, modify or discharge this or any contract of insurance, to extend the time for paying a premium, to waive any lapse or forfeiture or any of the Company's rights or requirements, or to bind the Company by making any promise respecting any benefits hereunder or by accepting any representation or information not contained in the written application for this Policy.

In Witness Whereof, the Company has caused this Policy to be executed this Ninth day of December 1919.

Signed Charles A. Peabody, President.
David F. Houston. President.
(Above signature cancelled)
Signed George C. Keefer Secretary
William L. Simrell Secretary.
(Above signature cancelled)
Countersigned Cancelled. Registrar.

(*Attached Provision*):

Increasing Disability Benefits

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK

If the Insured under Policy No. 2,677,078 in The Mutual Life Insurance Company of New York, to which Policy this provision for Disability Benefits it attached and of which it forms a part, is totally and presumably permanently disabled before age 60, the Company

Will Pay to said Insured
A Monthly Income of Fifty Dollars

during such disability, increasing after five and ten years continuous disability, besides waiving pre-

mium payments under said Policy, all in accordance with the following provisions and conditions.

Total Disability: Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for said Insured to follow a gainful occupation.

Permanent Disability: Total disability shall, during its continuance, be presumed to be permanent;

(a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of said Insured; or,

(b) If such disability has existed continuously for ninety days.

When Benefits become Effective: If, before attaining the age of sixty years and while no premium under said Policy or under this provision for Disability Benefits is in default, and, if said Policy shall be an Endowment Policy, before the end of the endowment period, said Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of said Insured so long as such disability continues.

Benefits: (a) Increasing Income: The Company will pay to said Insured during the continuance of such disability, a monthly disability income of the amount stated above ($10 per $1000 face amount of said Policy), beginning upon receipt of due proof of such disability and increasing after sixty consecutive monthly payments have been made to one and one-half times such amount and after sixty further consecutive monthly payments have been made to twice such amount at which it shall remain while

total and permanent disability continues. If such disability has continued more than one month, said income payments will begin as of the end of the first completed month of such disability instead of on the date of receipt of such proof if due proof is also furnished to the Company that such disability hase been continuous since its beginning.

(b) Waiver of Premium: The Company will also, after receipt of such due proof of total and permanent disability, waive payment of each premium under said Policy as it thereafter becomes due during such disability and, if due proof is also furnished to the Company that such disability has been continuous since its beginning, the Company will return any premium due after the beginning of such disability which has been paid during its continuance.

Reinstatement of Policy: If, not later than six months after the due date of any premium in default and provided no previously due premium is also in default and before said Insured has attained the age of sixty years, due proof is received by the Company that said Insured was totally and permanently disabled, as defined above, at the date when such premium in default fell due, and has been continuously so disabled since said due date, said Policy will be reinstated without evidence of insurability and the waiver of premium and disability income benefits shall be the same as if such default had not occurred.

Specified Disabilities: The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands or both feet or one hand and one foot, will be considered total and permanent disability.

General Provisions: The Company may, before making any disability income payment or waiving

any premium, require due proof of the continuance of total and permanent disability, but such proof shall not be required oftener than once a year after such disability has continued for two years. If such proof is not furnished on demand or if it shall appear to the Company that said Insured is no longer totally and permanently disabled, no further disability income payments will be made or premiums waived.

Neither the dividends nor the amount payable in any settlement of said Policy shall be decreased because of Disability Benefits granted.

If there shall be a loan on said Policy and if the monthly disability income is being paid by the Company under this provision, the Company shall automatically apply such part of said income toward the interest payments on such loan as may be necessary to prevent said Policy becoming void under the provisions of the section in said Policy entitled "Loans".

If said Insured shall at any time so recover that the payment of Disability Benefits terminates and later shall furnish due proof that he has again become totally and permanently disabled, Disability Benefits shall be the same in amount and subject to the same conditions as if no prior disability had existed.

If the disability of said Insured shall be the result of insanity, disability income payments shall be payable to the beneficiary under said Policy, if any, instead of to said Insured.

Any disability income payment which may become payable and which is unpaid at the death of said Insured shall be paid to such beneficiary.

Disability Benefits shall not be granted if disabil-

ity is the result of self-inflicted injury.

This provision for Disability Benefits shall automatically terminate if said Insured shall at any time, voluntarily or involuntarily, engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada.

If requested in writing by said Insured, the Company will terminate this provision for Disability Benefits by endorsement hereon.

Premiums: This provision for Disability Benefits is made in consideration (1) of the statements made by said Insured in the application for this provision for Disability Benefits and to the medical examiner in continuation thereof and (2) of the payment of an additional premium of Ten & 61/100 Dollars on the date hereof and of Sixteen and 70/100 Dollars on each 9th day of December hereafter while premiums under said Policy are payable. The premium provided for in said Policy includes this additional premium and if at any time the method of premium payments under said Policy shall be changed, each premium thereafter payable under said Policy shall include a corresponding additional premium for this provision for Disability Benefits.

If said Insured attains the age of sixty years, or if this provision for Disability Benefits terminates before all of the premiums required by said Policy shall have become payable, the premiums, if any, payable under said Policy after such age or such termination shall be reduced by the additional premium charged for Disability Benefits.

This provision for Disability Benefits shall take effect as of February 23rd 1928.

Dated at New York, N. Y., this 23rd day of February 1928.

Signed David F. Houston President.
David F. Houston. President.
(Above signature cancelled)
Signed William L. Simrell Secretary.
William L. Simrell Secretary
(Above signature cancelled)
Countersigned Cancelled. Registrar.
26-304. 1000-5-30.

Sep 5509

January 1918 Issue.

This Application is made to The Mutual Life Insurance Company of New York. All the following statements and answers, and all those that I make to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. I expressly waive, on behalf of myself and any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided:

1. My name is (in full): Carl F. Stroehmann.
2. (a) My residence and period of residence:

Street, W. Carter; County, Boyds; Town, City or Village, Ashland; State or Prov., Kentucky; For Period of, yrs. , mos., 2. (b) My place of business is: 310 W. Winchester St. Ashland Ky. (c) My P. O. address is: Ashland Ky. (d) My former residences were: Pleasant Valley, Wheeling W. Va.: For Period of, Life.

3. Date of my birth: Day, 8; Month, Aug.; Year, 1896; Age at last birthday, 23.

4. Place of my birth: Town or City, Wheeling; State or Prov., W. Va.; Country, U. S. A.; Citizen or subject of, U. S.

5. (a) My present occupation is: (Full details, business or trade and name of firm.) Mgr. Ashland Bakery Ashland Ky. (b) I have been so engaged yrs. 2 mos. (c) My other occupations are: None.

6. (a) My former occupations were: Chemist. (b) Period of time so engaged, 1 yrs. mos.

7. I do not contemplate any change of occupation, or becoming connected with any military, naval, aeronautic or aviation organization or service or going to any foreign or tropical countries except: (if none, so state) None.

8. (a) Are you connected with any military, naval or aviation organization or service, officially or otherwise? (Ans. Yes or No.) No. (b) if so, state particulars specifying whether an active member or one in reserve:

9. (a) Name (in full) of the person i. e. beneficiary, to whom the sum insured is to be made payable: Irene L. Stroehmann. Cash and Loan options reserved to insured. (b) Residing in Pleasant Valley, Wheeling W. Va. (c) Relationship or insurable interest (in proposed life) of said beneficiary: Sister. (d) Privilege of changing the beneficiary from time to time, provided policy has not been as-

signed, is desired: (Ans. Yes or No) Yes. (c) Have you any person wholly dependent on you for support? Ans. (Yes or No.) No.

10. I have the following insurance on my life in other Companies and Associations: Name of Company or Association, None.

11. (a) Amount of insurance applied for: $5,000. (b) Plan, (State fully.) Ordinary Life. (c) Premiums to be paid annually.

12. If the Company consents to grant it, do you desire the policy to provide, in accordance with terms of Company's forms now in use, for General. (a) "Double Indemnity" (a) Yes. (b) "Disability Benefits" (b) Yes. (c) "Waiver of Premium" (c) Yes.

13. No negotiations for other insurance on my life are now pending or contemplated except as follows: (if none, so state) None.

14. I have never made an application nor submitted to an examination for life insurance upon which a policy has not been issued on the plan and premium rate originally applied for, except to the following companies or associations: (if none, so state) None.

15. I have paid $ in cash to the subscribing Soliciting Agent and received a conditional receipt therefor, signed by the Secretary of the Company, making insurance in force from this date, provided this application shall be approved and policy duly issued.

It is understood and agreed that, during the period of one year following the date of issue of the Policy of Insurance for which application is hereby made, (a) the risk of death will not be covered by the Policy if such death occur by my own act, whether sane or insane, (b) if I engage in any of

the following extra-hazardous occupations or employments: retailing intoxicating liquors, handling electric wires or dynamos, blasting, mining, submarine, labor, aviation, aeronautic ascensions, the manufacture of highly explosive substances, service upon any railroad train or track or in switching or in coupling cars, or on any steam or other vessel, without express written permission by the Company, said policy shall be void. I agree that the policy, if issued, may set forth restrictions on (1) military or naval service or work in connection with warfare, or (2) hazards due to warfare or insurrection outside of the United States of America, and that any such provisions shall be binding upon me and upon any one having any interest in said policy. I agree that no agent or other person except the President, Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company has power on behalf of the Company to make, modify or discharge any contract of insurance, to extend the time for paying a premium, to waive any lapse or forfeiture or any of the Company's rights or requirements, or to bind the Company by making any promise respecting any benefits under any Policy issued hereunder or by accepting any representation or information not contained in this application.

Signature in full of person whose
Life is proposed for insurance
Carl Frederick Strochmann

Dated at Ashland Ky. on 9-15 1919.

I have known the above named applicant for (just met) and saw him sign this application.

I have issued Conditional receipt No.

Howard M Hughes
Soliciting Agent.

(Printed on right hand margin):

The applicant, upon request, may have policy antedated for a period not to exceed six months.

Statements to Medical Examiner.
These must be recorded in the handwriting of the Medical Examiner, who should satisfy himself that the applicant's statements and answers are full and complete.

16. What is your full name? Carl Frederick Stroehmann.

17. What illnesses, diseases, injuries or surgical operations have you had since childhood? Name of diseases, etc., Typhoid fever; Number of attacks, One; Date of each, 1903; Duration, Short; Severity, Moderate; Results, Recovery; Date of complete recovery, 1903. Name of disease, etc., Pneumonia; Number of attacks, One; Date of each, 1904; Duration, Short; Severity, Moderate; Results, Recovery; Date of complete recovery, 1903. Name of disease, etc., Rheumatism; Number of attacks, Two; Date of each, 1912; Duration, Ten weeks; Severity, Moderate; Results, Recovery; Date of complete recovery, 1912. Name of Disease, etc., Injury to back (foot-ball); Number of attacks, One; Date of each, 1915; Duration, 2 or 3 weeks; Severity, Severe pain; Results, Recovery; Date of complete recovery, 1915.

18. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years. Name of physician or practitioner, Drs. Truschel & Schwinn; Address, Schmulbach Bldg., Wheeling W. Va.; When con-

sulted, 1915; Nature of complaint. Give full details above under Q. 17, Injury to back. Name of physician or practitioner, Dr. Sylvester; Address, Somerville, Mass.; When consulted, 1918; Nature of complaint. Give full details above under Q. 17. Fracture of lower jaw while playing foot-ball—four weeks—complete recovery—no disability present.

19. Have you stated in answer to question 17 all illnesses, diseases, injuries or surgical operations which you have had since childhood? (Ans. Yes or No.) Yes.

20. Have you stated in answer to question 18 every physician and practitioner consulted during the past five years and dates of consultation? (Ans. Yes or No.) Yes.

21. (a) Are you in good health? Yes. (b) If not, what is the impairment? None.

22. (a) How much weight have you gained in the past year? None. (b) How much weight have you lost in the past year? None. (c) If any change, state cause, None.

23. (a) What is your date of birth? August 8, 1896. (b) Is this date or is your age a matter of record? Yes. (c) If so, where? State House, Wheeling W. Va.

24. Are you married? No.

25. Are you now or have you ever been engaged in any way in the sale or manufacture of beer, wine or other intoxicating liquors? (Ans. Yes or No) No.

26. (a) Have you used wine, spirits or malt liquors during the past year? Yes, beer and light wine. (b) If so, what has been your daily average in past year? Three glasses of beer. (c) How much have you used in any one day at the most? Three glasses of beer. (d) Have you been intoxicated

during the past five years? No. (e) Have you ever taken treatment for alcoholic or drug habit? No. (f) If a total abstainer, how long have you been so?

If any of the questions 27 to 36 below are answered Yes, give details in space adjacent.

27. Have you ever raised or spat blood? No.

28. Have you a rupture or hernia? No.

29. Have you any bodily deformity? No.

30. Have you lost any part of arm or leg? No.

31. Have you any impairment of sight or hearing? No.

32. Have you ever been under treatment at any asylum, cure, hospital, or sanitarium? No.

33. Have you ever changed your residence on account of your health? No.

34. Do you contemplate making any change in your residence? No.

35. Has any member of your household suffered from tuberculosis or consumption during the past year? No.

36. Has there ever been any suspicion that any of your parents, brothers or sisters ever had tuberculosis or consumption, cancer, insanity, epilepsy, paralysis or apoplexy? No.

37. Family record of Applicant: Father—Living; Age, 58; Health, Good. Mother—Living; Age, 51; Health, Good. Age of father's father, if living ; If not, age at death? 80. Age of father's mother, if living? ; If not, age at death? 65. Age of mother's father, if living? ; If not, age at death? 80. Age of mother's mother, if living? ; If not, age at death? 55 to 60. Brothers—Number living (If none, so state), One; Number dead (If none, so state), None; Living—Age, 18; Health,

Good. Sisters—Number living (If none, so state), Three; Number dead (If none, so state), None. Living—Age, 35, 28, 13; Health, Good, Good, Good.

I certify that each and all of the foregoing statements and answers were read by me and are fully and correctly recorded by the Medical Examiner.

Carl Frederick Stroehmann
Signature in full of person examined.

Dated at Ashland State of Kentucky the 15th day of September 1919.

Witness:
J. M. Salmon M. D.

The beneficiary is changed to the Insured's wife,
Mildred Stroehmann
The right to revoke this designation of beneficiary is reserved to the insured.

(Signature cancelled)
Secretary.

New York, March 12, 1920.

The beneficiary is changed to Northern Central Trust Company, Williamsport, Pa. as trustee, or its successor trustee, under an agreement of trust dated October 27, 1926 made by and between the Insured Carl F. Stroehmann and the said Northern Central Trust Company.

The right to revoke this designation of beneficiary is reserved to the Insured.

(Signature cancelled)
Secretary.

New York, N. Y. December 10, 1926.

It is understood and agreed that The Mutual Life

Insurance Company of New York shall not be responsible for any failure of the said trustee to perform its duties as trustee, nor for the application or disposition of any moneys paid to the said trustee, and payment to the said trustee shall fully discharge The Mutual Life Insurance Company of New York for the amount so paid.

The Mutual Life Insurance
Company of New York,
(Signature cancelled)
Secretary.

New York, N. Y. December 10, 1926.
32-506

The beneficiary is changed to Lycoming Trust Company, Williamsport, Pa., as trustee, or its successor trustee, under an agreement of trust dated February 4, 1927 made by and between the Insured Carl F. Strochmann and the said Lycoming Trust Company.

The right to revoke this designation of beneficiary is reserved to the Insured.

(Signature cancelled)
Secretary.

New York, N. Y. February 24, 1927.

It is understood and agreed that The Mutual Life Insurance Company of New York shall not be responsible for any failure of the said trustee to perform its duties as trustee, nor for the application or disposition of any moneys paid to the said trustee, and payment to the said trustee shall fully dis-

charge The Mutual Life Insurance Company of New York for the amount so paid.

The Mutual Life Insurance
Company of New York,
(Signature cancelled)
Secretary.

New York, N. Y. February 24, 1927.
32-506

Page 4

The Insured has reserved to himself the right to exercise the following privileges accruing under the terms and conditions of this policy, namely: to surrender this policy for its cash value, and to secure loans from the Company on this policy and to assign the same as collateral security for such loans.

The Mutual Life Insurance
Company of New York,
Signed George C. Keefer Secretary.
(Signature cancelled)

New York, N. Y., December 9th, 1919
14-107 Secretary

The clause in this policy entitled "Benefits in the Event of Total and Permanent Disability before Age 60" has been cancelled as of this date and the rider entitled Increasing Disability Benefits has been substituted therefor.

The Mutual Life Insurance
Company of New York,
(Signature cancelled)

New York, N. Y., February 23, 1928
26-517 D. B. Secretary.

Premiums hereafter payable have been changed

to $124.25 annually which amount includes the additional premium, or premiums, stated in the rider, or riders, attached to this policy bearing the same date at this endorsement or a prior date, and remaining in full force.

The Mutual Life Insurance
Company of New York,
(Signature cancelled)
Secretary.

New York, N. Y. Feb 23 1928
26-516

10**G
Life—Dis. and D. I. Gen.
January, 1919.
Annual Dividend
ORDINARY LIFE POLICY
With Total and Permanent Disability Benefits
and
Double Indemnity for Death by Accident
No. 2,677,078
THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK
Insurance on the Life of
Carl F. Stroehmann
Amount, $5000.
Date, December 9th, 1919
Term of Life.
Annual Premium, $124.25 Payable for Life.
1000-6-31

EXHIBIT F

All Questions to Be Answered by the Person to Be Insured

(Whenever the word "insured" is used in this application, it shall be construed as meaning "the person whose life is proposed for insurance.")

This Application is made to The Mutual Life Insurance Company of New York herein called the Company. All the following statements and answers, and all those that the Insured makes to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. The Insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the Insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided.

Name in full of Insured: Given Name, Middle Name (if any) and Surname: Carl F. Stroehmann.

1. Residence of Insured—Street and No., No. Street ; Town, City or Village, Norristown or miles in a Direction from on R. F. D. No. ;

County: Montgomery. State or Province: Pa; Former residences, No. 343 Washington Street, Town, City or Village and State or Province, Williamsport Pa; Period, Yrs., 6. Place of Business of Insured, Norristown Pa; Period, Yrs., 1. Name of firm or employer of Insured, (Self) Stroehmann Bros. Present occupation of Insured, Mfyr. Nature of business of Insured, Bakeries; so engaged 7 yrs. Other occupations of Insured are: (If none, state None) None. Former occupations of Insured: (If none, state None) Nature, None; Place . . . . . Insured was born at Town or City, Wheeling; State or Country, West Va. on the 8 day of Aug 1896; Age of Insured at nearest birthday 34 years. Insured is a Citizen or Subject of (Country) U S A. Send all communications to Ins. at Stroehmann Bros Co. 55 Curran Arcade Norristown Pa.

2. Except as stated below in (7), The Insured does not contemplate either (a) going to a foreign or tropical country, or (b) changing his occupation.

3. Except as stated below in (7), The Insured has not made, nor does he contemplate making aviation flights or aeronautical ascensions.

4. Except as stated below in (7), No negotiations for other insurance on the life of the Insured, nor any application for reinstatement of insurance on the life of the Insured, are now pending or contemplated.

5. Except as stated below in (7), No application for life insurance on the life of the Insured has ever been declined or postponed by any company or association.

6. The following is all the insurance now in force on the Insured's life: (If none, state None) Name

of Company or Association, No. Western; Amount, 80000. No D. B. Mutual Life, 10000; Union Central, 50000 D. B. on 10000. Provident Mutual, 50000 D B on 25000.

7. Details fe Questions 2, 3, 4 and 5 (If none, state None) (No. Health Ins.) 2. None. 3. None. 4. None. 5. None.

8. (a) Amount of insurance applied for $40000, (b) Premiums to be paid .... annually.

9. Plan of insurance (State fully) Ordinary Life. Answer Yes, No—1. Increasing Disability Benefits, Yes. 2. Level Disability Benefits, Yes. 3. Double Indemnity Benefit, Yes. 4. Waiver of Premium Benefit, Yes. Disability income if any payable to (Insert Insured or Beneficiary) Ins.

10. It is agreed that if the Company is unwilling to issue a policy for plan and amount applied for, this application shall be for such plan and amount as may be issued by the Company.

(Written across above paragraph: See Slip)

11. Unless otherwise herein specified policy will be payable to Beneficiary if living, if not living Insured's estate. (a) Name (in full) of Beneficiary. If a corporation give head office and state of incorporation, Northern Central Trust Co. as trustee or its successors trustee under an agreement of trust dated 10/27/1926. (b) P. O. Address, Williamsport Pa. (c) Relationship to the Insured or Insurable Interest ..... If Endowment state payee at maturity as Endowment .....

12. The privilege of changing the Beneficiary from time to time, provided policy has not been assigned is reserved to the Ins (Insert Insured or Beneficiary).

13. The right, without consent of any other per-

son to loan and surrender values and to dividends and options provided in policy, is reserved to the Ins (Insert Insured or Beneficiary).

14. $ . . . . in cash has been paid to the Soliciting Agent and a conditional receipt No. . . . . , signed by the Secretary of the Company, and countersigned by the agent has been issued making the insurance in force from this date, provided this application shall be approved.

It is agreed that in the event of the self-destruction of the Insured during the first year following the date of issue of the policy hereby applied for whether sane or insane the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no Agent or other person except the President, Vice-President, a Second Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promise respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements.

Signature in full of Insured

Carl F. Stroehmann

Dated at Norristown Pa on June 25 1930

I have known the Insured for 3 years and saw him sign this application.

J C Hughes, M I Baxter & C I Keebler Solicitting Agent.

This application is made at the instance and request of the undersigned, who, it is agreed, will pay all premiums out of his, her or its funds, and who

ratifies the representations, statements, answers and agreements contained in such application and in the statements to Medical Examiner.

.....

Signature in full of person or persons who will pay the premiums

(Foregoing to be executed only when the application is made at the instance and request of some one other than the person to be insured and who will pay the premiums.)

Statements of the Insured to Medical Examiner

These must be recorded in the handwriting of the Medical Examiner, who should satisfy himself that the Insured's statements and answers are full and complete.

15. What is your full name? Carl F. Stroehmann.

16. What illnesses, diseases, injuries and surgical operations have you had since childhood? Name of disease, etc., Appendicitomy; Number of Attacks, 1; Date of each, 1925; Duration 24 Days; Complications, No; Any remaining effects, No; Date of Complete Recovery, 1925.

17. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years for any ailment, serious or not serious. Name of physician or practitioner, Dr Geo Drick; Address, Williamsport Pa; When consulted, 1929; Nature of Complaint. Give full details above under Q. 16., Coryza.

18. Have you stated in answer to question 16 all illnesses, diseases, injuries and surgical operations which you have had since childhood? (Ans. Yes or No.) Yes.

19. Have you stated in answer to question 17 every physician and practitioner consulted during

the past five years and dates of consultations: (Ans. Yes or No.) Yes.

20. (a) Are you in good health? Yes. (b) If not, what is the impairment?

21. (a) How much weight have you gained in the past year? 3 Lbs. (b) How much weight have you lost in the past year? No. (c) If any change, state cause, Natural Causes. (d) How long has weight remained constant?

22. (a) What is your date of birth? Aug 8-1896. (b) Is this date or is your age a matter of record, (If so, where?) Wheeling-W. Va.

23. Are you married? Yes.

24. (a) To what extent have you used wine, spirits or malt liquors during the past year? (State amount, kind and how much in any one day at the most.) No. (b) Do you use any of them daily? (If so, state kind and amount.) No. (c) Have you been intoxicated during the past five years? (State how often and how recently.) No. (d) If a total abstainer, how long have you been so? Always. (e) Have you ever taken cure for alcoholic or drug habit? (If so, give date or dates.) No.

25. (a) Is there any impairment of vision in the right eye? No. (b) or in the left eye? No. (c) If so, state the cause and the degree of impairment in each eye.

26. Have you ever raised or spat blood? Yes or No, No.

27. Have you a rupture or hernia? Yes or No, No.

28. Have you any bodily deformity? Yes or No, No.

29. Have you lost any part of arm or leg? Yes or No, No.

30. Have you any impairment of hearing? Yes or No, No.

31. Have you ever been at any asylum, cure, hospital or sanitarium for treatment, observation or diagnosis? Yes or No,

32. Have you been under any restriction of diet or any medical or other treatment or medical observation of any kind, within one year for any purpose? Yes or No, No.

33. Have you ever changed your residence on account of your health? Yes or No, No.

34. Do you contemplate making any change in your residence? (If so, why?) Yes or No, No.

35. Hase any member of your household suffered from tuberculosis within the past two years? (If so, date when last exposed?) Yes or No, No.

36. Has there ever been any suspicion that any of your parents, brothers or sisters ever had tuberculosis, insanity, epilepsy, paralysis or apoplexy? Yes or No, No.

If any of questions 26 to 36 are answered "Yes" give full details. Appendectomy 1925.

37. Family record if living—Father; Age, 64; Condition of health, Good. Mother; Age, 61; Condition of health, Good. How many brothers living? (If none living, so state) 1; Age, 30; Condition of health, Good. How many sisters living? (If none living, so state) 3; Age, 40, 37, 25; Condition of health, Good, Good, Good. If dead—How many brothers dead? (If none dead, so state) 0. How many sisters dead? (If none dead, so state) 0. Age of grandparents—Father's father, Dead, 70+; Father's mother, Dead, 60+; Mother's father, Dead, 80; Mother's mother, Dead, 45.

I certify that each and all of the foregoing state-

ments and answers were read by me and are fully and correctly recorded by the Medical Examiner.

C. F. Stroehmann
Signature in full of the Insured.

Dated at Norristown State or Province of Pa the 26 day of June 1930.

Witness:

W. Stuart Watson M. D.

25-401A

(Printed on right hand margin):

Upon request the policy may be antedated for a period not to exceed six months unless prohibited by law.

Medical Examiner's Report.

38. (a) How long and how intimately have you known the Insured? Never. (b) Give some mark of identification. Burn RT elbow, Appendicitis scar.

39. General appearance? (Healthy or unhealthy.) Healthy.

40. Apparent age? 34 years.

41. Race? (as white, etc.) White.

42. Weight? 167 lbs.

43. Did you weigh Insured on scales? No.

44. Height by measurement? 6 feet ½ inches.

45. Measurement of chest at full inspiration? 37½ inches.

46. Measurement of chest at deep expiration? 34 inches.

47. Measurement of abdomen at level of umbilicus? 29 inches.

48. State the pulse rate? (Count a full minute. If over 90 or under 50 retake.) 84.

49. (a) Is the pulse intermittent? No. (b) Is the pulse Irregular? No. (If answered "yes" give full

details.)

50. If the Insured is ruptured, examine the hernia and state: (a) Location and size? No. (b) Is it easily reducible? √. (c) Is a suitable truss worn? √.

51. Urinary analysis of specimen voided at this examination. (a) Clear or turbid? (If turbid, cause.) Clear. (b) Gravity? (If under 1010 examine another specimen.) 1020. (c) Reaction? Acid. (d) Presence of albumin? No. (e) Presence of sugar? No. (f) Do you know that the Insured passed this urine? Yes.

52. Do careful inquiry and thorough physical examination show any evidence of past or present disease or functional disturbance of: (a) Brain or nervous system? Yes or No, No. (b) Heart? Yes or No, No. (c) Arteries? Yes or No, No. (d) Respiratory organs? Yes or No, No. (e) Kidneys or other urinary apparatus? Yes or No, No. (f) Digestive organs? Yes or No, No. (g) Liver, gall bladder or other abdominal viscera? Yes or No, No. (h) Rheumatic or gouty nature? Yes or No, No. (i) Syphilitic origin? Yes or No, No. (j) Either eye? (If Myopia, is it severe?) Yes or No, No. (k) Septic nature in the nose or mouth? Yes or No, No. (l) Middle ear? (Any discharge?) Yes or No, No. (m) Thyroid, skin or any part of body? Yes or No, No.

53. Was examination of heart and lungs made on other than bare skin? (If so, explain.) Yes or No, No.

54. Was any third person present, contrary to Company's rules, while you were asking the Insured questions? Yes or No, No.

55. Do you know, or suspect that the Insured ever has, or now uses alcoholic beverages to excess,.

or any narcotic? Yes or No, No.

56. After reviewing the answers recorded in the Statements to Medical Examiner and in the Medical Examiner's Report, are you satisfied that every question has been answered fully? Yes or No, Yes.

57. Do you know of anything in connection with the Insured's physical condition, family history or past health record not already recorded, which would affect his (her) insurability? (If so, give details under "Remarks") No.

Remarks: Blood Pressure (Ausculatory Method) Systolic, 122; Diastolic, 86; Pulse Pressure, 36. (Note: Take systolic at first constant sound. Take diastolic just before sound disappears. If systolic pressure is over 155 or diastolic over 100, retake blood pressure on another day and report findings. Before taking blood pressure, Examiner should be sure that applicant is seated, relaxed and at ease.)

(Stamped):
Acceptable for 100,000
Med'l Dept. No. 3

I certify that I have made this examination of Carl F. Stroehmann at Norristown on this 26 day of June 1930 at 3 P. M. and that the foregoing questions have been put, and the answers of the Insured recorded as stated.

W Stuart Watson M. D.
Medical Examiner.

Important notice to Medical Examiner

This Report is the property of the Company and must be delivered or mailed promptly by the Examiner to the Agency manager As Indicated Below. It must not be withdrawn or destroyed by anyone Before sending the Report to the Manager the Ex-

aminer must review it with care and see that every question is fully answered.

For Medical Dept.
by
For Inspector of Risks
Without Special Benefits
With Special Benefits
D. I. G. and Increasing D. B. (name illegible)
6/28/30
D. I. G. and D. B.
D. I. G. and W. of P.
D. I. G. only
Increasing D. B. only
D. B. only
W. of P. only

EXHIBIT G

Page 1

Policy No. 4,361,192
Amount, $40000.
Age 34

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK

(First Policy issued February 1st, 1843)

Will Pay

to the Northern Central Trust Company, Williamsport, Pennsylvania as trustee or its successor trustee under trust agreement dated October 27, 1926 between the Insured, Carl F. Stroehmann and said Trust Company as trustee. See trustee clause on page four hereof, the Beneficiary,

Forty Thousand ..... Dollars.

(Face Amount of this Policy)

upon receipt of due proof of the death of Carl F. Strochmann, the Insured, or

Eighty Thousand ..... Dollars,

(Double the Face Amount of this Policy)

upon receipt of due proof that such death resulted from bodily injury, effected solely through external, violent, and accidental means, and occurred within ninety days after such injury, all upon the conditions set forth in Section 1,

And

if the Insured is totally and presumably permanently disabled before age 60,

Will Pay

to the Insured Four Hundred Dollars monthly during such disability, increasing after five and ten years continuous disability, besides waiving premium payments, all upon the conditions set forth in Section 3.

This Policy also provides for

Optional Modes of Settlement (Section 2), Annual Dividends (Section 4),

Application of Dividends to make Policy fully paid or mature as an Endowment (Section 5),

Privilege of Change to other Forms of Policy (Section 6),

Loans (Section 7), Cash Value (Section 8),

Options on Lapse—Continued Term Insurance, Paid-up Insurance, or Cash Value (Section 9),

Grace in Payment of Premiums (Section 12),

Privilege of Reinstatement (Section 13).

This Policy is issued in consideration of the application and of the payment of the first premium of Thirteen hundred seventy Dollars, receipt of which is hereby acknowledged, and of the payment to the Company of Thirteen hundred seventy Dol-

lars (of which Forty Dollars is the premium for the Double Indemnity Benefit and Two hundred thirty-eight & 80/100 Dollars the premium for Disability Benefits) on each Thirtieth day of June hereafter until the death of the Insured.

The succeeding pages 2, 3, and 4 of this Policy are a part of this contract.

In Witness Whereof, the Company has caused this Policy to be executed this Thirtieth day of June 1930.

(Signed) David F. Houston
David F. Houston. President.
(Above signature cancelled)

(Signed) William L. Simrell
William L. Simrell Secretary.
(Above signature cancelled)

Countersigned Cancelled. Registrar.

Amount of Insurance Payable at Death. Double Indemnity for Death by Accident. Total and Permanent Disability Benefits Providing for Increasing Monthly Income and Waiver of Premium. Annual Dividends. Premiums Payable for Life, Unless Dividends Applied to Shorten Period.

(Printed on left hand margin):

Death Benefit

Double Indemnity

Disability Benefits
(a) Income and (b) Waiver of Premium

General Provisions

Premiums

25-2
Ordinary Life Inc. Dis. and D. I.

Page 2

Section 1. Double Indemnity.

The Double Indemnity will be payable upon receipt of due proof that the Insured died as a direct result of bodily injury effected solely through external, violent, and accidental means, independently and exclusively of all other causes, and of which, except in the case of drowning or asphyxiation, there is evidence by a visible contusion or wound on the exterior of the body, and that such death occurred within ninety days after the date of such injury; provided that the Double Indemnity shall not be payable if death resulted from self-destruction, whether sane or insane, or from military or naval service in time of war, or from any act incident to war, or from engaging in riot or insurrection, or from committing an assault or felony, or from participation in aeronautics, or directly or indirectly from disease or bodily or mental infirmity.

The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law.

If requested in writing by the Insured, the Company will terminate the provision for Double Indemnity by endorsement on this Policy. If so terminated, the premiums payable thereafter shall be reduced by the premium for such benefit.

Section 2. Optional Modes of Settlement.

The proceeds of this Policy, upon maturity as a death claim or upon surrender, as the case may be, may, if so elected, be settled by one of the following optional Modes of Settlement instead of being paid in one sum:—

Option 1.—By the Company's holding the proceeds as a principal sum payable at the death of the

payee, the Company meanwhile paying monthly interest (with a final interest payment to the date of such death) at three per cent a year plus participation in excess interest at such rate as the Company may determine for each year;

Option 2.—By payment of equal monthly instalments for the number of years elected, in accordance with the table on page 4. Instalments will be increased by participation in excess interest over three per cent a year at such rate as the Company may determine for each year;

Option 3.—By payment of equal monthly instalments for five, ten, or twenty years certain, as elected, and for the remaining lifetime of the payee, in accordance with the table on page 4. Instalments for the period certain will be increased by participation in excess interest over three per cent a year at such rate as the Company may determine for each year;

Option 4.—By payment of equal monthly instalments of the amount specified in the election as long as the proceeds, together with interest thereon as provided for in Option 1, shall suffice, with a final payment of any balance less than one such instalment.

Under Option 1 the first interest payment will be due at the end of one month from the date when the proceeds become payable. Under Options 2, 3, and 4 the first instalment will be due when the proceeds become payable.

Note.—If requested in the election, payment of interest under Option 1 or of instalments under Option 2, 3, or 4 will be made quarterly, semi-annually, or annually instead of monthly. The first payment of interest under Option 1 will be due at the end

of three months, six months, or one year according as interest payments are quarterly, semi-annual, or annual. The first instalment under Option 2, 3, or 4 will in all cases be due when the proceeds become payable.

Method of Election.—An optional Mode of Settlement can be elected, or a previous election revoked or changed, only by written notice to the Company accompanied by the Policy for endorsement.

Note.—When a payee becomes entitled to a single sum, he may elect one of these options.

General Provisions.—Joint or contingent payees may be named under the above options within such limitations as may be prescribed by the Company, except that under Option 3 there cannot be joint payees and the instalments to contingent payees will not be payable beyond the period certain.

These optional Modes of Settlement are not available if a corporation, association, partnership, or estate is the payee, nor if the guaranteed interest payments or instalments will, irrespective of dividends or indebtedness, be less than $10 each.

If any of the above options has been elected, a supplementary contract bearing the date on which the proceeds of the Policy become payable and providing for the settlement elected will be issued.

Surrender or Transfer of Supplementary Contract.—Unless otherwise specified in the election, neither the supplementary contract nor any of the benefits accruing thereunder shall be transferable or subject to surrender, commutation, or encumbrance, except that at the death of the last surviving payee the then surrender value as defined below shall be payable to the executors or administrators of such payee.

The surrender value of the supplementary contract shall be as follows:

Option 1.—The principal sum with any accrued interest;

Options 2 and 3.—The commuted value, computed at three per cent interest compounded annually, of future instalments certain. Under Option 3 no such surrender may be made during the lifetime of the original payee;

Option 4.—Such part of the proceeds of the Policy and interest thereon as shall not have been paid in instalments.

Section 3.—Benefits in Event of Total and Permanent Disability before Age 60.

Total Disability.—Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the Insured to follow a gainful occupation.

Permanent Disability.—Total disability shall, during its continuance, be presumed to be permanent;

(a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of the Insured; or,

(b) If such disability has existed continuously for ninety days.

When Benefits become Effective.—If, before attaining the age of sixty years and while no premium on this Policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the Insured so long as such disability continues.

Benefits. (a) Increasing Income.—The Company will pay a monthly income to the Insured of the amount stated on the first page hereof ($10 per $1,000 face amount of Policy), beginning upon receipt of due proof of such disability and increasing after sixty consecutive monthly payments have been made to one and one-half times such amount and after sixty further consecutive monthly payments have been made to twice such amount at which it shall remain while total and permanent disability continues.

(b) Waiver of Premium.—The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability.

Specified Disabilities.—The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands or both feet or one hand and one foot, will be considered total and permanent disability.

General Provisions.—The Company may, before making any income payment or waiving any premium, require due proof of the continuance of total and permanent disability, but such proof shall not be required oftener than once a year after such disability has continued for two years. If such proof is not furnished on demand or if it shall appear to the Company that the Insured is no longer totally and permanently disabled, no further income payments will be made or premiums waived.

Neither the dividends nor the amount payable in any settlement hereof shall be decreased because of Disability Benefits granted.

If the Insured shall at any time so recover that the payment of Disability Benefits terminates and later shall furnish due proof that he has again be-

come totally and permanently disabled, Disability Benefits shall be the same in amount and subject to the same conditions as if no prior disability had existed.

If the disability of the Insured shall be the result of insanity, income payments shall be payable to the beneficiary, if any, instead of to the Insured.

Any disability income payment which may become payable and which is unpaid at the death of the Insured shall be paid to the beneficiary.

Disability Benefits shall not be granted if disability is the result of self-inflicted injury.

The provision for Disability Benefits shall automatically terminate if the Insured shall at any time, voluntarily or involuntarily, engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada.

If requested in writing by the Insured, the Company will terminate the provision for Disability Benefits by endorsement on this Policy.

If the Insured attains the age of sixty years or if the provision for Disability Benefits terminates, the premiums payable after such age or such termination shall be reduced by the premium for such benefits.

Section 4. Annual Dividends.

The share of the divisible surplus accruing on this Policy shall be allotted as a dividend annually on each anniversary of its date, the first such dividend being payable only if any premium due on the first anniversary be duly paid.

At the option of the Insured, each such dividend shall be either:—

1. Used to purchase a paid-up participating ad-

dition to the sum insured (without Double Indemnity or Disability Benefits), herein called dividend addition, which shall be automatically added on the date of allotment and will continue in force unless and until one of the other options be duly elected; or,

2. Paid to the Insured in cash; or,

3. Used toward payment of any premium if the remainder of the premium is duly paid; or,

4. Deposited with the Company at interest within ninety days from date of allotment (called dividend deposit.) Interest will be credited at such rate as may be determined by the Company, but never less than three per cent a year, and will be added to existing dividend deposits annually. Dividend deposits existing at the death of the Insured shall be then payable to the beneficiary.

The Insured may at any time, provided there is no premium more than three months in default, surrender any dividend additions for the full reserve thereon or withdraw any accumulated dividend deposits.

Post Mortem Dividends.—Upon the death of the Insured a cash dividend will be credited to this Policy for the fraction of the policy year elapsed before such death.

Section 5. Dividend Additions or Deposits may be applied to make the Policy either:—

(a) Fully Paid.—If at any time either the reserve for any dividend additions, or any accumulated dividend deposits, or both together, shall equal or exceed the present value (on the basis of the American Experience Table of Mortality assuming three per cent interest) of the future net premiums under this Policy, the Company will, upon the writ-

ten request of the Insured, apply a sufficient amount of such reserve and such deposits to change this Policy to a paid-up participating policy for the same face amount and providing for the same benefits, including Double Indemnity and Disability Benefits, if any, as this Policy.

Any dividend additions or dividend deposits in excess of those applied to pay such present value shall continue in force.

or (b) Mature as an Endowment.—If at any time the reserve for the face amount of this Policy and for any dividend additions, together with any accumulated dividend deposits, shall equal or exceed the face amount of this Policy, the Company will, upon the legal surrender of the Policy, pay such face amount plus such excess, if any.

Section 6. Privilege of Change to other Forms of Policy.

Provided this Policy is in full force and no premium is in default and provided the Insured is not, and at no time has been, totally and permanently disabled within the meaning of Section 3 of this Policy and has not attained the age of fifty-five years, this Policy may be exchanged, without medical examination, for a premium paying policy, issued by the Company at the date of this Policy, on either the Limited Payment Life or the Endowment Insurance plan, of the same date, face amount, and age of the Insured, and containing the same Double Indemnity and Disability Benefits as this Policy. The new policy will be at the rate of premium in force for such a policy at the date of this Policy.

To make such exchange this Policy must be surrendered for rewriting and there must be paid to

the Company the differences in premiums (or, if greater, the differences in premiums exclusive of the premiums for the Double Indemnity and Disability Benefits) with interest from their respective due dates at the rate of six per cent a year compounded annually. Allowance will be made for any larger dividends on the new plan.

Section 7. Loans.

If three full years' premiums have been paid (or if the balance is paid at the time of loan) and no premiums are in arrears beyond the days of grace, the Company will, upon receipt of the Policy and a loan agreement satisfactory to the Company and on the sole security of this Policy, loan an amount which with interest shall be within the limit of the cash value of this Policy.

Any existing indebtedness to the Company on the Policy shall be paid out of such loan.

Interest on the loan shall be at the rate of six per cent a year payable on the due date of the loan and on each anniversary of the date of the Policy thereafter. If this interest is not paid when due it shall be added to the existing loan and bear interest at the same rate. Failure to repay the loan or pay interest shall not avoid the Policy unless the total indebtedness,

including accrued interest, shall equal or exceed the cash value of the Policy, in which case the Policy shall become void thirty-one days after notice shall have been mailed to the Insured and assignee of record at the Home Office of the Company, if any, at their last known addresses.

The loan, with accrued interest, or any part thereof not less than $10, may, at the option of the In

sured, be repaid at any time prior to the date when due.

In case disability income is being paid by the Company under the provisions of Section 3, the Company shall automatically apply such part of said income toward the interest payments as may be necessary to prevent the Policy becoming void under the provisions of this section.

Section 8. Cash Value.

At any time after at least three full years' premiums have been duly paid but not later than three months after default in payment of premium, this Policy may be surrendered for its net cash value. Such net cash value shall be the cash value as defined below less any indebtedness to the Company hereon.

(a) If all past due premiums have been paid, (1) the cash value on any anniversary of the date of the Policy or any premium due date other than an anniversary shall be the reserve at such time for the face amount of this Policy and for any dividend additions hereto increased by any accumulated dividend deposits and less a surrender charge of not more than one and one-half per cent of the face amount of this Policy, or (2) the cash value on a prior date shall be the cash value mentioned in (1) less interest thereon at the rate of six per cent a year.

After the Policy has been ten years in force there shall be no surrender charge.

(b) During three months after the due date of any premium in default the cash value shall be the same as at such due date except as decreased by the surrender of dividend additions or withdrawal of dividend deposits.

After any premium has been in default more than three months from its due date, this Policy shall have no cash value.

Section 9. Options on Lapse.

(a) Continued Term Insurance.—If any premium remain unpaid at the end of the days of grace, and if at least three full years' premiums have been paid, this Policy will, without action on the part of the Insured, continue, as from the due date of such premium in default, as paid-up non-participating term insurance, without Double Indemnity or Disability Benefits.

The amount of such term insurance shall be the face amount of this Policy increased by any dividend additions and by any dividend deposits and decreased by any indebtedness to the Company on this Policy. The term shall be such as the net cash value at such premium due date provided for in Section 8 (adjusted for any later loans, surrender of dividend additions, or withdrawal of dividend deposits) applied as a net single premium will purchase.

Within three months after the due date of such premium in default either of the following options may be exercised instead of having the Policy continue as such term insurance.

(b) Cash Value.—The Policy may be surrendered for the net cash value provided for in Section 8; or,

(c) Paid-up Insurance.—The Policy may be surrendered for paid-up non-participating life insurance, without Double Indemnity or Disability Benefits, payable at the same time and upon the same conditions as this Policy, the amount of such paid-up insurance being such as the net cash value applied as a net single premium will purchase.

Section 10. Table of Cash and Loan Values and Options on Lapse.

These values are computed in accordance with the provisions of Sections 7, 8, and 9 and are on the assumptions that all premiums to end of years indicated have been paid and that there are no dividends or indebtedness.

Any dividend additions or dividend deposits will increase such values and any indebtedness to the Company on this Policy will decrease such values as provided in the above mentioned sections.

Values for intermediate periods for which premiums have been paid will be calculated as provided in Sections 7, 8 and 9.

	For Each $1,000 Face Amount		For Face Amount Paid-up Non-Participating Continued Term Insurance for	
At End of Policy Year	Cash Value (Also Loan Value as Explained in Section 7)	Paid-up Non-Participating Life Insurance	Years	Days
3	$ 30.53	$ 70.18	3	180
4	41.30	93.24	4	249
5	55.46	122.95	6	79
6	69.67	151.65	7	245
7	86.76	185.39	9	112
8	104.25	218.65	10	285
9	122.13	251.38	12	26
10	140.40	283.58	13	64
11	156.56	310.27	13	331
12	173.10	336.57	14	185
13	190.00	362.44	14	364
14	207.26	387.86	15	139
15	224.86	412.81	15	246

At End of Policy Year	For Each $1,000 Face Amount: Cash Value (Also Loan Value as Explained in Section 7)	For Each $1,000 Face Amount: Paid-up Non-Participating Life Insurance	For Face Amount Paid-up Non-Participating Continued Term Insurance for: Years	Days
16	242.76	437.24	15	324
17	260.93	461.10	16	11
18	279.35	484.38	16	39
19	298.00	507.09	16	47
20	316.86	529.21	16	33
21	335.89	550.71	16	12
22	355.06	571.59	15	337
23	374.35	591.85	15	286
24	393.72	611.47	15	226
25	413.15	630.48	15	156
30	509.82	715.96	14	79

Ordinary Life. Age 34.

Note.—If premiums are paid to the end of a policy year, the loan value stated in the above table for the end of such year will, less interest, be available during such year as provided in Section 7.

Section 11. Reserves and Net Single Premiums.

The reserve held for the face amount of this Policy and for any dividend additions, and the reserves and net single premiums mentioned in this Policy shall be computed in accordance with the American Experience Table of Mortality assuming interest at the rate of three per cent a year, the net single premiums being those at the attained age of the Insured.

Section 12. Premiums.

All premiums are payable on or before their due

date either at the Home Office of the Company or to any agent of the Company, but only on delivery of a receipt signed by the Treasurer of the Company and countersigned by the person receiving the premium.

A grace of thirty-one days shall be granted for the payment of each premium after the first, during which days of grace the insurance shall continue in force.

If this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy year in which such death occurs (including the overdue premium, if death occurs within the days of grace) shall be deducted from the amount payable.

If any premium be not paid before the end of the days of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as provided in this Policy.

Section 13. Reinstatement.

This Policy, unless it shall have been surrendered for cash, may be reinstated at any time within five years after default in payment of premium upon evidence of the Insured's then insurability satisfactory to the Company and the payment of all overdue premiums with compound interest at the rate of five per cent a year and upon the payment or reinstatement of any indebtedness to the Company on this Policy together with payment of interest in accordance with the loan provisions of this Policy.

Section 14. Miscellaneous Provisions.

Residence and Travel.—This Policy is free from

restrictions as to residence and travel.

Occupation.—This Policy is free from restrictions as to occupation except the restrictions as to military or naval service applying (a) to the Double Indemnity Benefit as provided in Section 1, and (b) to Disability Benefits as provided in Section 3.

Suicide.—In the event of the self-destruction of the Insured, whether sane or insane, within one year after the date of issue of this Policy, the amount payable shall be limited to an amount equal to the premiums paid hereon.

Incontestability.—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue.

Misstatement of Age.—If the age of the Insured shall have been misstated, the amount payable by the Company shall be such as the premium paid would have purchased at the correct age.

Change of Beneficiary.—Unless otherwise provided by endorsement on this Policy or unless there be an existing assignment of this Policy other than to the Company, the Insured may, from time to time, while the Policy is in force, change the beneficiary by filing written notice at the Home Office of the Company accompanied by the Policy for endorsement. Such change shall take effect upon endorsement of the Policy by the Company.

The interest of any beneficiary who dies before the Insured shall vest in the Insured unless otherwise provided in this Policy.

Rights of the Insured.—Except as may otherwise be specifically provided by endorsement, the Insured may, during his lifetime, without the consent and to the exclusion of the beneficiary, exercise every option, enjoy every privilege, and receive every benefit conferred by this Policy, whether else where specifically reserved to the Insured or not.

Policy Settlement.—All sums payable by the Company under this Policy shall be payable at the Home Office of the Company in the City of New York.

In any settlement of this Policy at its maturity as a death claim or on surrender, any indebtedness to the Company on this Policy shall be deducted and surrender of the Policy to the Company will be required.

The Contract.—This Policy and the application, copy of which is attached, constitute the entire contract.

All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid or be used in defence to a claim under this Policy unless contained in the written application and a copy of the application is attached to the Policy when issued.

Assignment.—The Company shall not be charged with notice of any assignment of any interest in this contract until the original assignment or a certified copy thereof has been filed with the Company at its Home Office.

The Company assumes no responsibility as to the validity or effect of any assignment.

All assignments shall be subject to any indebtedness to the Company on account of or secured by this Policy.

Notice.—No agent or other person except the

President, Vice President, a Second Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promises respecting benefits, or accepting any representations or information not contained in the written application for this Policy, or to make or modify this contract, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements.

'Questions to be answered by the person to be insured:

(Whenever the word "insured" is used in this application, it shall be construed as meaning "the person whose life is proposed for insurance.")

This Application is made to The Mutual Life Insurance Company of New York herein called the Company. All the following statements and answers, and all those that the Insured makes to the Company's Medical Examiner, in continuation of this application, are true, and are offered to the Company as an inducement to issue the proposed policy. The Insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the Insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and

unless and until the first premium shall have been paid during the Insured's continuance in good health; except in case a conditional receipt shall have been issued as hereinafter provided.

Jun 13136

Name in full of Insured: Given Name, Middle Name (if any) and Surname: Carl F. Stroehmann.

1. Residence of Insured—Street and No., No. Street ; Town, City or Village, Norristown or miles in a Direction from on R. F. D. No. ; County, State or Province, Montgomery Pa; Former residences, No. 343 Washington Street; Town City or Village and State or Province, Williamsport Pa; Period, Yrs., 6. Place of Business of Insured, Norristown Pa; Period, Yrs., 1. Name of firm or employer of Insured, (Self) Stroehmann Bros. Present occupation of Insured, Mfyr. Nature of business of Insured, Bakeries; so engaged 7 yrs. Other occupations of Insured are: (If none, state None) None. Former occupations of Insured: (If none, state None) Nature, None; Place . Insured was born at Town or City, Wheeling; State or Country, West Va. on the 8 day of Aug 1896; Age of Insured at nearest birthday 34 years. Insured is a Citizen or Subject of (Country) U S A. Send all communications to Ins. at Stroehmann Bros Co. 55 Curran Arcade Norristown Pa.

2. Except as stated below in (7), The Insured does not contemplate either (a) going to a foreign or tropical country, or (b) changing his occupation.

3. Except as stated below in (7), The Insured has not made, nor does he contemplate making aviation flights or aeronautical ascensions.

4. Except as stated below in (7), No negotiations

for other insurance on the life of the Insured, nor any application for reinstatement of insurance on the life of the Insured, are now pending or contemplated.

5. Except as stated below in (7), No application for life insurance on the life of the Insured has ever been declined or postponed by any company or association.

6. The following is all the insurance now in force on the Insured's life: (If none, state None) Name of Company or Association, No. Western; Amount, 8000. No D. B. Mutual Life, 10000; Union Central, 50000 D. B. on 10000. Provident Mutual, 50000 D B on 25000.

7. Details re Questions 2, 3, 4 and 5 (If none, state None) (No. Health Ins.) 2. None. 3. None. 4. None. 5. None.

8. (a) Amount of insurance applied for $40000. (b) Premiums to be paid annually.

9. Plan of insurance (State fully) Ordinary Life. Answer Yes, No—1. Increasing Disability Benefits, Yes. 2. Level Disability Benefits, Yes. 3. Double Indemnity Benefit, Yes. 4. Waiver of Premium Benefit, Yes. Disability income if any payable to (Insert Insured or Beneficiary) Ins.

10. It is agreed that if the Company is unwilling to issue a policy for plan and amount applied for, this application shall be for such plan and amount as may be issued by the Company.

(Written across above paragraph: See Slip)

11. Unless otherwise herein specified policy will be payable to Beneficiary if living, if not living Insured's estate. (a) Name (in full) of Beneficiary. If a corporation give head office and state of incorporation, Northern Central Trust Co. as trustee or

its successors trustee under an agreement or trust dated 10/27/1926. (b) P. O. Address, Williamsport Pa. (c) Relationship to the Insured or Insurable Interest . . . . . If Endowment state payee at maturity as Endowment . . . . . .

12. The privilege of changing the Beneficiary from time to time, provided policy has not been assigned is reserved to the Ins (Insert Insured or Beneficiary).

13. The right, without consent of any other person to loan and surrender values and to dividends and options provided in policy, is reserved to the Ins (Insert Insured or Beneficiary).

14. $ . . . in cash has been paid to the Soliciting Agent and a conditional receipt No. , signed by the Secretary of the Company, and countersigned by the agent has been issued making the insurance in force from this date, provided this application shall be approved.

It is agreed that in the event of the self-destruction of the Insured during the first year following the date of issue of the policy hereby applied for whether sane or insane the Company's liability shall be limited to the amount of the premiums paid. It is agreed that no Agent or other person except the President, Vice-President, a Second Vice-President, or a Secretary of the Company has power on behalf of the Company to bind the Company by making any promise respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of

the Company's rights or requirements.

Signature in full of Insured
Carl F. Stroehmann

Dated at Norristown Pa on June 25 1930

I have known the Insured for 3 years and saw him sign this application.

J C Hughes, M I Baxter & C I Keebler Soliciting Agent.

This application is made at the instance and request of the undersigned, who, it is agreed, will pay all premiums out of his, her or its funds, and who ratifies the representations, statements, answers and agreements contained in such application and in the statements to Medical Examiner.

.....

Signature in full of person or persons who will pay the premiums.

(Foregoing to be executed only when the application is made at the instance and request of some one other than the person to be insured and who will pay the premiums.)

Statements of the Insured to Medical Examiner

These must be recorded in the handwriting of the Medical Examiner, who should satisfy himself that the Insured's statements and answers are full and complete.

15. What is your full name? Carl F. Strochmann.

16. What illnesses, diseases, injuries and surgical operations have you had since childhood? Name of disease, etc., Appendicitomy; Number of Attacks, 1; Date of each, 1925; Duration, 24 days; Complications, No; Any remaining effects, No; Date of Complete Recovery, 1925.

17. State every physician or practitioner who has prescribed for or treated you, or whom you have consulted in the past five years for any ailment, serious or not serious. Name of physician or practitioner, Dr Geo Drick; Address, Williamsport Pa; When consulted, 1929; Nature of Complaint. Give full details above under Q. 16., Coryza.

18. Have you stated in answer to question 16 all illnesses, diseases, injuries and surgical operations which you have had since childhood? (Ans. Yes or No.) Yes.

19. Have you stated in answer to question 17 every physician and practitioner consulted during the past five years and dates of consultations. (Ans. Yes or No.) Yes.

20. (a) Are you in good health? Yes (b) If not, what is the impairment?

21. (a) How much weight have you gained in the past year? 3 Lbs. (b) How much weight have you lost in the past year? No. (c) if any change, state cause, Natural Causes. (d) How long has weight remained constant?

22. (a) What is your date of birth? Aug 8-1896. (b) Is this date or is your age a matter of record, (If so, where?) Wheeling-W. Va.

23. Are you married? Yes.

24. (a) To what extent have you used wine, spirits or malt liquors during the past year? (State amount, kind and how much in any one day at the most.) No. (b) Do you use any of them daily? (If so, state kind and amount.) No. (c) Have you been intoxicated during the past five years? (State how often and how recently.) No. (d) If a total abstainer, how long have you been so? Always. (e) Have you ever taken cure for alcoholic or drug

habit? (If so, give date or dates.) No.

25. (a) Is there any impairment of vision in the right eye? No. (b) or in the left eye? No. (c) If so, state the cause and the degree of impairment in each eye.

26. Have you ever raised or spat blood? Yes or No, No.

27. Have you a rupture of hernia? Yes or No, No.

28. Have you any bodily deformity? Yes or No, No.

29. Have you lost any part of arm or leg? Yes or No, No.

30. Have you any impairment of hearing? Yes or No, No.

31. Have you ever been at any asylum, cure, hospital or sanitarium for treatment, observation or diagnosis? Yes or No,

32. Have you been under any restriction of diet or any medical or other treatment or medical observation of any kind, within one year for any purpose? Yes or No, No.

33. Have you ever changed your residence on account of your health? Yes or No, No.

34. Do you contemplate making any change in your residence? (If so, why?) Yes or No, No.

35. Has any member of your household suffered from tuberculosis within the past two years? (If so, date when last exposed?) Yes or No, No.

36. Has there ever been any suspicion that any of your parents, brothers or sisters ever had tuberculosis, insanity, epilepsy, paralysis or apoplexy? Yes or No, No.

If any of questions 26 to 28 are answered "Yes" give full details. Appendectomy 1925.

37. Family record if living—Father; Age, 64; Condition of health, Good. Mother; Age, 61; Condition of health, Good. How many brothers living? (If none living, so state) 1; Age, 30; Condition of health, Good. How many sisters living? (If none living, so state) 3; Age, 40, 37, 25; Condition of health, Good, Good, Good. If dead—How many brothers dead? (If none dead, so state.) 0. How many sisters dead? (If none dead, so state) 0. Age of grandparents—Father's father, Dead, 70+; Father's mother, Dead, 60+; Mother's father, Dead, 80; Mother's mother, Dead, 45.

I certify that each and all of the foregoing statements and answers were read by me and are fully and correctly recorded by the Medical Examiner.

C. F. Stroehmann
Signature in full of the Insured.

Dated at Norristown State or Province of Pa the 26 day of June 1930.
Witness:
W. Stuart Watson M. D.
25-401A

(Printed on right hand margin):
Upon request the policy may be antedated for a period not to exceed six months unless prohibited by law.

Page 4
Monthly and Annual Instalments for Each $1,000 of Proceeds of Policy under Optional Modes of Settlement 2 and 3

The semi-annual and quarterly instalments are 50.37% and 25.28% respectively of the annual instalment.

Option 2

Number of Years' Instalments	Each Monthly Instalment	Each Annual Instalment
2	$42.86	$507.39
3	28.99	343.23
4	22.06	261.19
5	17.91	212.00
6	15.14	179.22
7	13.16	155.83
8	11.68	138.31
9	10.53	124.69
10	9.61	113.82
11	8.86	104.93
12	8.24	97.54
13	7.71	91.29
14	7.26	85.95
15	6.87	81.33
16	6.53	77.29
17	6.23	73.74
18	5.96	70.59
19	5.73	67.78
20	5.51	65.26
21	5.32	62.98
22	5.15	60.92
23	4.99	59.04
24	4.84	57.33
25	4.71	55.76
26	4.59	54.31
27	4.47	52.98
28	4.37	51.74
29	4.27	50.60
30	4.18	49.53

Option 3

Age of Payee When Proceeds Payable	5 Years Certain		10 Years Certain		20 Years Certain	
	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment
10 and	$3.81	$44.85	$3.75	$44.21	$3.58	$42.20
11 under	3.83	45.07	3.77	44.41	3.59	42.36
12	3.85	45.30	3.79	44.62	3.61	42.54
13	3.87	45.54	3.81	44.84	3.62	42.71
14	3.89	45.78	3.83	45.07	3.64	42.90
15	3.91	46.03	3.85	45.29	3.65	43.08
16	3.94	46.27	3.87	45.53	3.67	43.27
17	3.96	46.52	3.89	45.76	3.69	43.47
18	3.98	46.77	3.91	45.99	3.70	43.66
19	4.00	47.02	3.93	46.23	3.72	43.87
20	4.02	47.28	3.95	46.48	3.74	44.07
21	4.05	47.55	3.97	46.74	3.76	44.29
22	4.07	47.84	4.00	47.01	3.78	44.52
23	4.10	48.14	4.02	47.29	3.80	44.75
24	4.12	48.45	4.05	47.59	3.82	45.00
25	4.15	48.77	4.07	47.90	3.84	45.25
26	4.18	49.12	4.10	48.22	3.86	45.51
27	4.21	49.47	4.13	48.56	3.89	45.79
28	4.25	49.85	4.16	48.91	3.91	46.07
29	4.28	50.24	4.19	49.28	3.94	46.37
30	4.32	50.65	4.23	49.66	3.96	46.67
31	4.35	51.08	4.26	50.07	3.99	46.99

Age of Payee When Proceeds Payable	5 Years Certain		10 Years Certain		20 Years Certain	
	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment
32	4.39	51.53	4.30	50.49	4.02	47.32
33	4.43	52.01	4.33	50.93	4.05	47.66
34	4.48	52.50	4.37	51.39	4.08	48.01
35	4.52	53.02	4.42	51.87	4.11	48.38
36	4.57	53.56	4.46	52.38	4.14	48.75
37	4.62	54.13	4.51	52.90	4.17	49.14
38	4.67	54.73	4.55	53.45	4.21	49.54
39	4.73	55.36	4.60	54.03	4.24	49.96
40	4.78	56.02	4.65	54.63	4.28	50.38
41	4.84	56.71	4.71	55.26	4.32	50.82
42	4.91	57.43	4.77	55.91	4.35	51.27
43	4.97	58.19	4.83	56.60	4.39	51.73
44	5.04	58.99	4.89	57.31	4.43	52.20
45	5.12	59.83	4.95	58.06	4.48	52.69
46	5.19	60.71	5.02	58.84	4.52	53.18
47	5.27	61.64	5.09	59.66	4.56	53.68
48	5.36	62.61	5.17	60.51	4.60	54.20
49	5.45	63.63	5.24	61.40	4.65	54.71
50	5.54	64.70	5.32	62.33	4.69	55.24
51	5.64	65.83	5.41	63.30	4.74	55.77
52	5.74	67.02	5.49	64.30	4.78	56.30
53	5.85	68.26	5.58	65.35	4.83	56.84
54	5.97	69.57	5.68	66.44	4.87	57.37

Age of Payee When Proceeds Payable	5 Years Certain		10 Years Certain		20 Years Certain	
	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Annual Instalment
55	6.09	70.95	5.78	67.57	4.92	57.90
56	6.22	72.40	5.88	68.75	4.96	58.43
57	6.35	73.93	5.98	69.98	5.00	58.95
58	6.49	75.53	6.09	71.24	5.05	59.46
59	6.64	77.22	6.21	72.55	5.09	59.96
60	6.80	78.99	6.32	73.91	5.13	60.45
61	6.96	80.85	6.44	75.31	5.17	60.92
62	7.13	82.81	6.57	76.75	5.20	61.37
63	7.31	84.87	6.70	78.23	5.24	61.80
64	7.51	87.03	6.83	79.75	5.27	62.20
65	7.71	89.31	6.96	81.30	5.30	62.59
66	7.92	91.69	7.09	82.89	5.33	62.94
67	8.14	94.19	7.23	84.50	5.36	63.27
68	8.37	96.81	7.37	86.14	5.38	63.57
69	8.61	99.56	7.51	87.79	5.40	63.84
70	8.86	102.43	7.65	89.46	5.42	64.08
71	9.13	105.44	7.79	91.12	5.42	64.08
72	9.40	108.57	7.93	92.79	5.42	64.08
73	9.69	111.84	8.07	94.44	5.42	64.08
74	9.99	115.25	8.21	96.06	5.42	64.08
75	10.30	118.78	8.34	97.65	5.42	64.08
76	10.62	122.44	8.47	99.21	5.42	64.08
77	10.95	126.22	8.59	100.71	5.42	64.08

Age of Payee When Proceeds Payable	5 Years Certain		10 Years Certain		20 Years Certain	
	Each Monthly Instalment	Each Annual Instalment	Each Monthly Instalment	Each Monthly Instalment	Each Monthly Instalment	Each Annual Instalment
78	11.29	130.13	8.71	102.14	5.42	64.08
79	11.64	134.14	8.82	103.51	5.42	64.08
80	12.00	138.25	8.92	104.80	5.42	64.08
81	12.36	142.44	8.92	104.80	5.42	64.08
82	12.73	146.70	8.92	104.80	5.42	64.08
83	13.09	151.00	8.92	104.80	5.42	64.08
84	13.46	155.34	8.92	104.80	5.42	64.08
85 and over	13.83	159.67	8.92	104.80	5.42	64.08

All Rights Reserved to the Insured.—The Insured without the consent, and to the exclusion, of the beneficiary, or any other person, shall have the right to exercise every option, enjoy every privilege and receive every benefit conferred by this policy, or allowed by the Company, including the right to change the beneficiary and the right to reduce the face amount of the policy.

The Mutual Life Insurance Company of New York,

New York, N. Y. September 26, 1930

William L. Simrell, Secretary.

(Above signature cancelled)

29-508 ARABC to I.

1 R G 1
Life—Inc. Dis. and D. I.
April, 1925.

Supplementary Benefits to Section Entitled "Benefits in Event of Total and Permanent Disability before Age 60".

Benefits if Proof Delayed and no Premium in Default.—If, while no premium is in default, the proof furnished the Company under the section providing for "Benefits in Event of Total and Permanent Disability before Age 60" is such as to entitle the Insured to the Disability Benefits provided for therein, and if due proof is also furnished the Company that such disability has been continuous since its beginning, the Company will;

(a) Begin the monthly income payments provided for in such section as of the end of the first completed month of such disability if earlier than the date of receipt of such proof instead of as of the date of receipt of such proof, and,

(b) return any premium due after the beginning of such disability which has been paid during the continuance thereof.

Benefits if Premium in Default not over Six Months.—If, not later than six months after the due date of any premium in default and provided no previously due premium is also in default, due proof is received by the Company, before the Insured shall have attained the age of sixty years that the Insured was totally and permanently disabled, as defined in the section entitled "Benefits in Event of Total and Permanent Disability before Age 60", at the date when such premium in default fell due, and has been continuously so disabled since said due date, the Policy will be reinstated without evidence

of insurability and the waiver of premium and disability income benefits shall be the same as if such default had not occurred.

The Mutual Life Insurance
Company of New York,
(Signed) William L. Simrell
William L. Simrell
Secretary.
(Above signature cancelled)

27-505. (Life.)

No. 4,361,192
The Mutual Life Insurance
Company of New York
Ordinary Life Policy
With
Double Indemnity for Death by Accident
and
Increasing Total and Permanent Disability
Benefits
On the Life of
Carl F. Stroehmann
Amount, ... $40000.
Date, June 30th 1930
Annual Premium, $1370.00
Payable for life unless dividends applied to
shorten period.

2500-7-30

It is understood and agreed that The Mutual Life Insurance Company of New York shall not be responsible for any failure of the said trustee to perform its duties as trustee, nor for the application or disposition of any moneys paid to the said trustee, and payment to the said trustee shall fully dis-

charge The Mutual Life Insurance Company of New York for the amount so paid.

The Mutual Life Insurance
Company of New York,
(Signed) William L. Simrell
William L. Simrell
Secretary.
(Above signature cancelled)

New York, N. Y. June 30th 1930.

The Beneficiary is changed to Lycoming Trust Company, Williamsport, Pa. as trustee, or its successor trustee, under an agreement dated March 7, 1928 made by and between the insured and the said trustee. It is understood and agreed that The Mutual Life Insurance Company of New York, shall not be responsible for any failure of the said trustee to perform its duties as trustee, nor for the application or disposition of any moneys paid to the said trustee, and payment to the said trustee shall fully discharge The Mutual Life Insurance Company of New York for the amount so paid.

All rights reserved to the Insured.

The Mutual Life Insurance
Company of New York,
William L. Simrell
Secretary.
(Above signature cancelled)

New York, N. Y. September 26 1930.
(27-509)

III.
MOTION TO DISMISS AMENDED BILL OF COMPLAINT
(Filed May 16, 1935)

Now, May 16, 1935 come Carl F. Strochmann and Harrisburg Trust Company, successor trustee to Lycoming Trust Company, trustee, defendants in the above entitled action, and move the court to dismiss the amended bill of complaint filed, for the following reasons:

1. The amended bill of complaint shows upon its face that Carl F. Strochmann, the insured named in the policies of insurance pleaded therein, has made demand upon the plaintiff for the payment of disability benefits, and, unless restrained will bring an action at law upon said policies to recover the same. By defense to such action the plaintiff has a full, complete and adequate remedy at law for all of the matters complained of in its amended bill of complaint.

2. The amended bill of complaint shows upon its face that the plaintiff has no cause of action against the defendants.

3. The amended bill of complaint shows upon its face that all the actions or causes of action which the plaintiff may or might have by reason of the matters stated in said bill of complaint are barred by the incontestability clause appearing in each of the policies, the disability benefit provisions of which are sought to be cancelled in the above entitled action.

4. The amended bill of complaint shows upon its face that any cause or causes of action which complainant had, or might have are barred by reason of the following facts to wit:

(a) Said action is an action to cancel the disability benefit provisions of policies Nos. 2646105, 2677078 and 4361192 issued by The Mutual Life Insurance Company of New York to Carl F. Stroehmann by reason of certain alleged misrepresentations in the applications for said disability benefit provisions.

(b) Said policy No. 2646105 was issued September 20, 1919, and contained therein the following incontestability clause:

> "*Incontestability*—This policy shall be incontestable after two years from its date of issue except for non-payment of premiums."

(c) By a supplemental agreement, dated February 23, 1928, attached to and made part of said policy No. 2646105 the disability benefits provided for in said policy were increased.

(d) Said amended bill of complaint does not seek to cancel the disability benefit provisions contained in said policy No. 2646105 as issued and as increased in accordance with the agreement heretofore referred to in sub-paragraph (c) by reason of non-payment of premiums but by reason of certain alleged misrepresentations contained in the request for change in disability benefits dated February 9, 1928, attached to the amended bill of complaint and marked Exhibit "A", and by reason of certain alleged misrepresentations contained in the application for such change dated February 11, 1928, attached to the amended bill of complaint and marked Exhibit "C".

(e) It does not appear that a contest on the ground of aforesaid alleged misrepresentations was instituted prior to the filing of the original bill of complaint on October 11, 1932, which date is more than two years after the making of said alleged misrepresentations.

(f) It does not appear that said request for change in disability benefits and said application for change in disability benefits heretofore referred to in sub-paragraph (d) were attached to said policy No. 2646105 in compliance with Art. III, Sec. 318 of the Act of May 17, 1921 P. L. 682 (40 P. S. Sec. 441) wherefore said request for change and said application are no part of said policy or contract and said disability benefits cannot be cancelled by reason of the misrepresentations alleged to be contained therein.

(g) Said Policy No. 2677078 was issued December 9, 1919 and contained therein the following incontestability clause:

> "*Incontestability*—This policy shall be incontestable after two years from its date of issue except for non-payment of premiums."

(h) By a supplemental agreement dated February 23, 1928, attached to and made part of said policy No. 2677078, the disability benefits provided for in said policy were increased.

(i) Said amended bill of complaint does not seek to cancel the disability benefit provisions contained in said policy No. 2677078 as issued and as increased in accordance with the agreement heretofore referred to in sub-paragraph (h) by reason of nonpayment of premiums but by reason of certain alleged misrepresentations contained in the request for change in disability benefits dated February 9,

1928 attached to the amended bill of complaint and marked Exhibit "B", and by reason of certain alleged misrepresentations contained in the application for such change dated February 11, 1928, attached to the amended bill of complaint and marked Exhibit "C".

(j) It does not appear that any contest on the ground of aforesaid alleged misrepresentations was instituted prior to the filing of the original bill of complaint on October 11, 1932, which date is more than two years after the making of said alleged misrepresentations.

(k) It does not appear that said request for change in disability benefits and said application for change in disability benefits heretofore referred to in sub-paragraph (h) were attached to said policy No. 2677078 in compliance with Art. III. Sec. 318, of the Act of May 17, 1921, P. L. 682 (40 P. S. Sec. 441) wherefore said request for change and said application are no part of said policy or contract and said disability benefits cannot be cancelled by reason of the misrepresentations alleged to be contained therein.

(l) Said policy No. 4361192 was issued June 30, 1930 and contained the following incontestability clause:

> "*Incontestability*—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this policy shall be incontestable after one year from its date of issue unless the insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

(m) It appears from the face of said amended bill of complaint that the insured Carl F. Stroehmann is living and has lived more than one year since the issuance of said policy wherefore said policy became incontestable one year after its date of issue to wit on June 30, 1931.

(n) Said amended bill of complaint does not seek to cancel the disability benefit provisions contained in said policy No. 4361192 by reason of nonpayment of premiums, nor by reason of any restriction or provision contained in sections 1 and 3 of the restrictions and provisions applying to Double Indemnity and Disability Benefits but by reason of certain alleged misrepresentations contained in the application for said policy.

(o) It does not appear that any contest on the ground of aforesaid alleged misrepresentations was instituted prior to the filing of the original bill of complaint on October 11, 1932, which date is more than one year after the making of said alleged misrepresentations.

GEORGE H. HAFER
GEO. ROSS HULL
SNYDER, HULL, HULL & LEIBY
CARL B. SHELLEY
Solicitors for Carl F. Stroehmann and Lycoming Trust Company, defendants, and Harrisburg Trust Company, successor trustee to Lycoming Trust Company.

IV.
OPINION DISMISSING AMENDED BILL OF COMPLAINT

(Filed July 2, 1935)

By Bill in Equity filed the Plaintiff, The Mutual Life Insurance Company of New York, prayed for a rescission and cancellation of the disability benefit provisions in policies of insurance issued to Carl F. Strochmann, one of the Defendants. The Defendants moved to dismiss the original Bill of Complaint, which motion was refused in an opinion by this Court filed May 17, 1934, in which the Court held that the incontestability clauses in the policies did not apply to disability benefits; that the disability clauses were exempt from the incontestability clauses, and that the insurer could sue for cancellation of disability benefit provisions because of alleged fraud inducing issuance of the policies. Since this Court refused to dismiss the Plaintiff's original Bill of Complaint, the Plaintiff filed an amended Bill of Complaint, April 18, 1935, alleging the same cause of action as that alleged in the original Bill of Complaint, but averring additional fraudulent acts on the part of the insured inducing the issuance of the policies. The Defendants have moved to dismiss the Amended Bill of Complaint.

Since the decision by this Court refusing to dismiss the original Bill of Complaint, there has been a decision by the Circuit Court of Appeals of the Ninth Circuit, The Mutual Life Insurance Company of New York vs. Joseph Markowitz and Rose Markowitz, No. 7796, not yet reported, and a de-

cision by the Circuit Court of Appeals of the Fourth Circuit, Ness vs. Mutual Life Insurance Company of New York, 70 Fed. (2d) 59. In both of these cases, the policies in suit contain incontestable clauses, the language of which is the same as that in Policy No. 4,361,192 in the case at bar, and the courts held that the incontestable clauses did apply to disability clauses in the policies.

The same question has not been decided by the Circuit Court of Appeals of this circuit, but, in view of the decisions by the Circuit Court of Appeals of the Fourth Circuit and the Circuit Court of Appeals of the Ninth Circuit, cited above, I now hold that the period of contestability passed before the original bill was filed in this case, and the defense of fraud in the procuring of the policies is not available against the insured.

Now, July 2, 1935, the Amended Bill of Complaint is dismissed. Plaintiff to pay the costs.

ALBERT L. WATSON
United States District Judge.

V.
OPINION SUSTAINING ORIGINAL BILL OF COMPLAINT.
(Filed May 17, 1934.)

The Mutual Life Insurance Company of New York, on October 11, 1932 filed a Bill in Equity against Carl F. Strochmann and Lycoming Trust Company, Trustee, to reform three policies of insurance issued by it on the life of Carl F. Stroehmann. One policy is No. 2,646,105, for the face amount of $5,000., and is dated September 20, 1919. This policy I shall refer to as Policy No. 1. Another policy is No. 2,677,078, for the face amount of $5,000., and is dated December 9, 1919. This policy I shall refer to as Policy No. 2. The other policy is No. 4,361,192, for the face amount of $40,000., and is dated June 30, 1930. This policy I shall refer to as Policy No. 3. It is alleged in the Bill that the said Carl F. Stroehmann made false answers to the questions of the medical examiners as to his physical condition at the time of his examinations, and that the Plaintiff issued the policies on the strength of these answers. Copies of the policies are attached to the Bill of Complaint. Each policy provides that the Mutual Life Insurance Company of New York will pay the face amount at the death of the insured, and double that amount if the insured's death is accidental. Each policy also provides for the payment of a monthly income to the insured in case of total and permanent disability of the insured and for the waiver of payment of premiums in case of the permanent disability of the insured. Policies Nos. 1 and 2 contain the following provisions as to incontestability: "This Policy shall

be incontestable after two years from its date of issue except for non-payment of premiums." Policy No. 3 contains the following provision as to incontestability: "Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue." The relief prayed for is the rescission and cancellation of the provision for disability benefit provisions in the policies and the restraining of the Defendant from bringing any action at law, or otherwise upon the policies for the payment of disability benefits until the hearing in this case and the final decree therein.

The Defendants moved the Court to dismiss the Bill of Complaint for the following reasons:

> "1. The bill of complaint shows upon its face that Carl F. Stroehmann, the insured named in the policies of insurance pleaded therein, has made demand upon the plaintiff for the payment of disability benefits, and, unless restrained will bring an action at law upon said policies to recover the same. By defense to such action the plaintiff has a full, complete and adequate remedy at law for all of the matters complained of in its bill of complaint.
>
> "2. The bill of complaint shows upon its face that the plaintiff has no cause of action against the defendants."

The questions, therefore, for the Court, are: (First), Whether the Bill of Complaint shows that the Plaintiff has a cause of action against the De-

fendants; and (Second), Whether the Plaintiff has a full, complete and adequate remedy at law for all the matters complained of in the Bill of Complaint.

I shall consider the questions in the order stated.

The question as to whether the Bill of Complaint shows that the Plaintiff has a cause of action against the Defendants should, in my opinion, be answered, in the affirmative. It is urged by the Defendants that the words in the incontestable clause in Policy No. 3 do not exclude from the incontestable clause the obligation to pay disability benefits but relate only to the particular limitations and provisions contained in sections 1 and 3 of the policy; that they were inserted to assure to the company the right to insist upon those limitations and provisions after the contestable period had expired, and that they were not intended to permit any contest of the obligation to pay on the ground of fraud after the expiration of the contestable period. In Mutual Life Insurance Co. vs. McConnell, et ux., 20 D. & C. (Penna.) 250, the same question arose on exactly the same incontestable clause. There the Court said: "The question for consideration of the court is whether the incontestability clauses in these policies preclude the insurer from avoiding the disability benefits on account of fraud if more than 1 year has expired since the policies were issued. It is clear that the policies are incontestable after 1 year from the date of issue, except for 'the restrictions and provisions applying to the double indemnity and disability benefits as provided in sections 1 and 3, respectively.' "

Section 3 is entitled: " 'Benefits in event of total and permanent disability before age of 60'. It would appear, therefore, that the incontestability

clauses do not apply to the disability benefits, and the action here seeks only the cancellation of the disability provisions. The defendants, however, contend that the incontestability clauses in the policies bar the suit of the plaintiff, notwithstanding the exceptions of section 3 relative to the disability cases. It is contended that the purpose of the clause in the policy is to preclude defenses to the policy after 1 year unless the defense is nonpayment of premium, or one of the defenses incident to double indemnity or disability necessary to protect the company from injustice, which defenses are all suggested in sections 1 and 3 of the policy. It is argued that the plaintiff company cannot now go back to the inception of the policy and allege fraud on the part of the insured in answering the questions set forth in the application."

"It is true the alleged fraud goes back to the obtaining of the policy, but why should that interfere with the operation of the exception as to the disability? We have had very few cases cited by counsel relative to the question before the Court, but we have given careful examination to these and made further investigation as to the law on the subject. We are of the opinion that it was the intent of the contracts to exempt from their incontestability clauses its operation in the disability provision. In other words, the incontestability clauses do not apply to the disability benefits, and the action now before the court seeking only the cancellation of the disability provisions is therefore brought in time." In Connecticut General Life Insurance Co. vs. Jos. F. Brandstein, 233 Appellate Division, N. Y. 723; the same questions were raised as are raised here. The incontestable clauses in the policies were as

follows: "'INCONTESTABILITY.' This policy shall be incontestable after it shall have been in force during the lifetime of the Insured for two years from its date except for non payment of premiums and except as to provisions and conditions relating to benefits in the event of total and permanent disability and those granting additional insurance specifically against death by accident; but if the age of the insured be misstated, the liability of the Company shall be the amount of insurance which the premium would have purchased at the correct age." The Defendant moved to dismiss the Bill of Complaint on the ground that on its face it did not state facts sufficient to constitute a cause of action. The decision held that a Bill of Complaint to cancel the disability clauses in the insurance policy was not barred by the fact that more than two years had expired since the date of the policy inasmuch as the disability clauses were excepted from the incontestability clauses.

In a very recent case, New York Life Insurance Co. vs. Davis, et al., District Court, Western District of Pennsylvania, 5 Fed. Supp. 316, Judge Schoonmaker, in the opinion, said: "The three policies of insurance involved in this suit would have been voidable in their entirety for fraud by reason of false answers by the insured to questions in the medical part of his application for insurance, but for the incontestable clause contained in each policy.

"This clause is as follows:

"'This policy shall be incontestable after two years from its date of issue, except for non-payment of premium and except as to provisions and conditions relating to disability and double indem-

nity benefits.'"

"The plaintiff contends that by reason of this clause, it has expressly reserved to itself the right to contest this policy in so far as the provisions and conditions therein contained relating to disability and double indemnity benefits. The defendant, on the other hand, contends that the policies in their entirety are incontestable on account of this clause.

"Our view is that this clause expressly reserves to the insurance company the right to contest its liability for disability and double indemnity benefits accruing under the policy. No other ruling would give effect to the agreement of the parties. After two years, the regular life insurance liability of the company may not be contested, but the disability and double indemnity provisions always remain open to contest. There is no difficulty in cancelling the insurance contract as to the two items, and leaving it in force as to the regular life insurance factors."

In my opinion, the Bill of Complaint shows that the Plaintiff has a cause of action against the Defendants.

The remaining question is, whether the Plaintiff has a full, complete and adequate remedy at law for all matters complained of in the Bill of Complaint.

The general rule is that Equity will not ordinarily take jurisdiction of a suit for cancellation of a policy of insurance for fraud in its procurement, for the reason that the insurance company has an adequate remedy at law in its right to defend on the ground of fraud in an action instituted on the policies. Brown vs. Pacific Life Insurance Co., 62 Fed. (2) 711, and many cases there cited. And it has been

held in a number of cases that, except for the presence of the incontestable clause in the policy, a Court of Equity would not have the right to assume and try the issue whether the policy was fraudulently procured. New York Life Insurance Co. vs. Seymour, 45 Fed. (2) 47; Phoenix Mutual Life Insurance Co. vs. Bailey, 13 Wall. 616; and Cable vs. United States Life Ins. Co. 191 U. S. 288. In the case at bar, Policy No. 3 contains no incontestable provision which applies to the disability benefits. Mutual Life Insurance Co. of N. Y. vs. McConnell et ux. supra.

In those cases where the courts have held that a court of Equity is without jurisdiction of a suit for cancellation of a policy of insurance for fraud in its procurement, the policies have been policies of life insurance. In the case at bar, the Plaintiff is not seeking the cancellation of the life insurance policies, but the cancellation of the disability provisions only. Policies Nos. 1, 2, and 3 each contain two separate contracts, one of life insurance, and the other of indemnity against total and permanent physical disability and for double indemnity. Penn Mutual Life Ins. Co. vs. Hartle, et al., 166 Atl. 614. On life insurance policies procured by fraud, there is but one cause of action, for a person dies but once. Disability policies procured by false representations and fraud create a continuous liability. It must be clear that the relief sought could not be obtained by defending an action instituted at law for recovery under the disability features of the policies, for an action at law might terminate in such a way as not to decide the issue of fraud. In Brown vs. Pacific Mutual Life Insurance Co. supra, in which there was a motion to dismiss the suit similar to the

motion in this case, the court said: "In the case at bar, the insured is living and there is consequently no possible way in which complainant can secure the full relief to which it is entitled except in equity. It is argued that relief might be obtained at law by defending the action instituted for recovery under the disability feature of the policy. But it is clear that this remedy would not be full, complete, or adequate. In the first place, the action at law might be terminated in such a way as not to decide the issue of fraud at all and in the meantime the policy might have become incontestable. In the second place, the judgment in that action would not be binding upon the beneficiary. See New York Life Ins. Co. vs. Halpern, (D. C.) 47 Fed. (2), 935,936. In addition to this, it is well settled that equity jurisdiction existing at the commencement of the suit is not lost because after the filing of the bill an adequate legal remedy has become available. Dawson vs. Kentucky Distilleries & Warehouse Co., 255 U. S. 288,296; 41 S. Ct. 272; 65 L. Ed. 638, N. Y. Life Ins. Co. vs. Seymour, supra. We think that both on reason and authority, therefore, the jurisdiction of equity in a case such as this is thoroughly established."

I conclude, therefore, that the Plaintiff does not have a full, complete and adequate remedy at law for all of the matters complained of in the Bill of Complaint.

The questions raised as to Policies Nos. 1 and 2 have not been discussed in this opinion, but the Bill certainly presents a case for relief, and it is well settled that a Bill will not be dismissed if it presents a case for relief. U. S. vs. Railway Employes' Department, American Federation of Labor, et. al., 286 Fed. 228. Ralston Steel Car Co. vs. National Dump Car Co., 222 Fed. 590.

Now, May 17, 1934, Defendants' Motion to dismiss is denied.

ALBERT L. WATSON,
United States District Judge.

VI.
PETITION FOR ALLOWANCE OF APPEAL
(Filed September 6, 1935)

And now, this sixth day of September, 1935, The Mutual Life Insurance Company of New York, the plaintiff in the above entitled suit, conceiving itself aggrieved by the order and decree made and entered on the 2nd day of July, 1935, in the above cause, dismissing the amended bill of complaint, does hereby appeal therefrom to the Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, that a citation be issued directed to the above named defendants, Carl F. Stroehmann and Lycoming Trust Company, Trustee, commanding them to appear before the Circuit Court of Appeals for the Third Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and pleadings upon which said order and decree were made be duly authenticated and sent to the said Circuit Court of Appeals.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.
By O'MALLEY, HILL, HARRIS & HARRIS,
FREDERICK L. ALLEN,
Its Attorneys.

VII.

ORDER OF COURT ALLOWING APPEAL ON FILING OF BOND
(Filed September 6, 1935)

The foregoing appeal is hereby allowed upon filing bond to be approved by this Court in the sum of Two Hundred and Fifty Dollars ($250.00).

Scranton, Pa., September 6, 1935.

ALBERT L. WATSON,
United States District Judge.

VIII.

ASSIGNMENTS OF ERROR
(Filed September 6, 1935)

And now, to wit, the Sixth day of September, 1935, comes The Mutual Life Insurance Company of New York, the plaintiff in the above entitled proceedings in equity, and files the following assignments of error, upon which it will rely in the prosecution of its appeal to the Circuit Court of Appeals for the Third Circuit from the decree made by this Honorable Court on the 2nd day of July, 1935, in the above cause:

I.

That the United States Court for the Middle District of Pennsylvania erred in dismissing the amended bill of complaint.

II.

That the said Court erred in impliedly holding that the cause of action set forth in the bill of complaint was lacking in equity.

III.

That the said Court erred in holding that the cause of action set forth in the amended bill of complaint was barred because this suit brought therefor was not brought within the period mentioned in the contestability clauses.

IV.

That the said Court erred in holding that the acts of fraud alleged in the amended bill of complaint could not be alleged in this suit against the insured for the cancellation of the disability agreements attached to the policies.

V.

That the said Court erred in holding that the contestability clauses in the policies were applicable to the disability agreements.

Wherefore, the appellant prays that the aforesaid decree be reversed and that the United States District Court for the Middle District of Pennsylvania be ordered to enter a decree in accordance with the bill of complaint or in such form as the Circuit Court of Appeals shall deem just.

O'Malley, Hill, Harris & Harris,
Attorneys for Plaintiff, Appellant.

IX.

CITATION

(Filed September 16, 1935)

United States of America, ss.

The President of the United States:

To Carl F. Stroehmann and Lycoming Trust Company, Trustee,

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to Appeal and Assignments of Error filed in the Clerk's Office of the District Court of the United States, Middle District of Pennsylvania, wherein, The Mutual Life Insurance Company of New York, is the Appellant and you are the Appellees to show cause, if any there be, why the Judgment rendered against said Appellant as in the said Appeal and Assignments of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witnesseth, the Honorable Albert L. Watson, Judge of the District Court of the United States, this 6th day of September in the year of our Lord, One Thousand Nine Hundred and Thirty-five.

S. W. HOFFORD,
Clerk.
per R. G. LOHMANN,
Deputy.

(Seal)

September 13, 1935, service of within citation acknowledged and copy received.

GEO. ROSS HULL,
Attorney for Appellees.

X.

PRAECIPE

(Filed September 6, 1935)

To the Clerk of the United States District Court for the Middle District of Pennsylvania.

Sir:

You will please prepare a transcript of the record to be transmitted to the Circuit Court of Appeals for the Third Circuit, in pursuance to the appeal heretofore taken in this case, and include therein the following:

1. Amended bill of complaint.
2. Motion to dismiss amended bill.
3. Opinion and order dismissing amended bill.
4. Opinion and order of the court sustaining original bill.
5. The assignments of error.
6. Copy of citation with proof of service.
7. Copy of all praecipes or signed stipulations.

O'MALLEY, HILL, HARRIS & HARRIS,
Counsel for Plaintiff-Appellant.

The foregoing praecipe for the transcript of record on appeal is hereby approved by the appellees.

SNYDER, HULL, HULL & LEIBY,
BY GEO. ROSS HULL,
Counsel for Appellees.

ORDER

Now, September 16, 1935, the Clerk of the District Court is authorized and directed to mail all the original files as specified in the praecipe to the Clerk of the United States Circuit Court of Appeals, Third Circuit, for the purpose of printing the transcript of record on appeal.

ALBERT L. WATSON,
U. S. District Court.

[fol. 174] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5934

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Complainant-Appellant,

vs.

CARL F. STROEHMANN and LYCOMING TRUST CO., Trustee, Respondents-Appellees

And afterwards, to wit, the 4th day of December, 1935, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 6th day of October, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 175] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5934

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Complainant-Appellant,

v.

CARL F. STROEHMANN and LYCOMING TRUST CO., Trustee, Respondents-Appellees

Appeal from the District Court of the United States for the Middle District of Pennsylvania

OPINION—Filed October 6, 1936

Before Buffington, Davis and Thompson, Circuit Judges

DAVIS, Circuit Judge:

This is an appeal from an order of the District Court dismissing the bill of complaint by which the appellant

sought to have the provisions for disability benefits in three policies of insurance issued by it to the appellee, Stroehmann, rescinded on the ground that he had made false and fraudulent misstatements in response to questions [fol. 176] in his medical examination. The appellant also prayed that the appellees be restrained from bringing any action at law or otherwise upon the policies. The appellees filed a motion to dismiss the bill. The District Court, after issuing an order on May 17, 1934 denying the motion reversed its position, and on July 2, 1935, issued the order dismissing the bill, on the authority of the decisions in Ness v. Mutual Life Ins. Co., 70 Fed. (2d) 59, (C. C. A. 4), and Mutual Life Ins. Co. v. Markowitz, 78 Fed. (2d) 396, (C. C. A. 9).

Policies No. 2,646,105 and No. 2,677,078, hereinafter referred to as policies Nos. 1 and 2, were issued in 1919. Both of these policies are for the face value of $5,000, and contain provisions for "Benefits in the event of total and permanent disability before age 60", which entitled the insured to annual payments so long as the disability continued, of "a sum equal to one tenth of the face amount of the policy." On February 9, 1928, Stroehmann signed two applications requesting that the above policies be changed to what is known as the "1926 Increasing Disability Benefits in event of Total and Permanent Disability * * *." These applications included the provision that if "the statements or answers in said medical examination shall be in any respect untrue, * * * any disability benefits granted under said policy shall be only those, if any, provided for in said policy before the change herein requested was made". After the medical examination was made, the change requested was effected on February 23, 1928, and the new disability provisions were attached to the original policies in riders.

On October 11, 1932 the appellant filed a bill of complaint, in which it prayed that the "Increasing Disability" provisions, added to policies Nos. 1 and 2, and the disability provision of policy No. 3 be rescinded because of fraudulent [fol. 177] misstatements made in answer to questions in the medical examination and that the defendants be restrained from bringing any action at law or otherwise on the policies. It will be noted that the insurer does not seek to

rescind the disability provisions under the original policies, Nos. 1 and 2.

The appellees contend that the disability provisions are no longer contestable by the complainant on the ground that the incontestability clause included in the original policies is applicable to the riders attached in 1928. The incontestability clause reads as follows: "This policy shall be incontestable after two years from its date of issue except for the non payment of premiums."

The only authority for the position of the appellees lies in the analogy in cases dealing with reinstatement of lapsed policies. Under these cases an incontestability clause begins to run anew as of the time that the lapsed policy is reinstated. Lincoln National Life Ins. Co. v. Hammer, 41 Fed. (2d) 12 (C. C. A. 8); New York Life Ins. Co. v. Seymour, 45 Fed. (2d) 47 (C. C. A. 6).

But the Company expressly reserved the defense of fraud by the provision in the application to the effect that in case the answers were in any respect untrue, the disability benefits should be those in the policy before the change.

The appellees further contend that even if the incontestability clause is inapplicable, under the Act of May 17, 1921 (P. L. 682, 701, 721, Art. III, Sec. 318, and Art. IV, Sec. 410 (d)) the application and report of the medical examination cannot be introduced in evidence to prove fraud because it was not attached to the policy.

The applicable provisions of the Act of May 17, 1921 read as follows:

[fol. 178] Art. III, Sec. 318:

"All insurance policies, issued by stock or mutual insurance companies or associations doing business in this State, in which the application of the insured, the constitution, by-laws, or other rules of the company form part of the policy or contract between the parties thereto, or have any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application as signed by the applicant, or the constitution, by-laws, or other rules referred to; and, unless so attached and accompanying the policy, no such application, constitution, or by-laws, or other rules shall be received in evidence in any controversy between the parties to, or interested in, the policy, nor

shall such application, constitution, by-laws, or other rules be considered a part of the policy or contract between such parties."

Art. IV, Sec. 410:

"No policy of life or endowment insurance, except policies of industrial insurance where the premiums are payable monthly or oftener, shall be issued or delivered by any stock or mutual life insurance company in this Commonwealth unless it contains, in substance, the following provisions:

"(d) A provision that the policy shall constitute the entire contract between the parties, but if the company desires to make the application a part of the contract, it may do so, provided a copy of such application shall be endorsed upon or attached to the policy when issued, and in such case the policy shall contain a provision that the policy and the application therefor shall constitute the entire contract between the parties."

The application for the increase of disability benefits, which contains as a part thereof the report of the medical examination, was, as above stated, not attached to the policy. The appellant attempts to answer this contention [fol. 179] by citing authorities to the effect that the application for a reinstatement of a lapsed policy may be introduced in evidence even though it is not attached to the policy. These cases, however, are based upon the theory that in the reinstatement of a lapsed policy no new policy is issued, and that therefore the situation is not covered by the above statute. Rothchild v. New York Life Ins. Co., 106 Pa. Super. Ct. 554; Jones v. Metropolitan Life Ins. Co., 109 Pa. Super. Ct. 506. But the provision for disability benefits and the provision for paying insurance on a life, though contained in the same policy of life insurance, are nevertheless severable and distinct contracts. Pyramid Life Ins. Co. v. Selkirk, 80 Fed. (2d) 553. Consequently the riders attached to policies Nos. 1 and 2 in 1928, were entirely new policies of disability insurance, and were based on the conditional abandonment of the disability provisions contained in the original policies. Under this interpretation the statute quoted above definitely prohibits the use of the application, and, therefore, the report of the medical

examination, which was a part thereof, is not in the evidence. The statute does not, however, prevent the appellant from proving the existence of fraud by other methods. In Gordon, Secretary of Banking v. Continental Casualty Co., 311 Pa. 109, the court made the following statement:

"That section 318 of 'The Insurance Company Law of 1921' which deals with this subject, does not exclude proof of the fact (of false statements made in the application) but only excludes its proof by the application itself, if not attached to the policy. Whether or not the fact can be otherwise proved, will be known when the case is tried in due course."

The case of Hews v. Equitable Life Assurance Society, 143 Fed. 850, decided by this court and relied upon by the [fol. 180] appellant, is not applicable to the present state of facts since in that case the report of the medical examination was not considered to be a part of the application.

In policies Nos. 1 and 2, therefore, the appellant has the right to have the increased disability benefit provisions, added thereto in 1928, rescinded if it is able to prove the existence of fraud on the part of the insured at the inception of these contracts without placing the applications in evidence.

Policy No. 4,361,192, referred to as policy No. 3, 4,361,-192, was issued on June 30, 1930, and has a face value of $40,000. This policy also contains disability and double indemnity provisions which the appellant is seeking to have rescinded because of alleged fraudulent misstatements made by the insured in response to questions in the medical examination.

The appellees contend that the disability and double indemnity provisions of this policy are no longer open to dispute because of the incontestability clause included therein which reads as follows:

"Incontestability.—Except for non payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this policy shall be incontestable after one year from its date of issue, unless the insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

In New York Life Insurance Co. v. Gatti, and New York Life Ins. Co. v. Ruhlin, — Fed. (2d) — (recently decided), where the incontestability clause was substantially the same as the one quoted above, we held that the insurer not only had the right to contest liability under the double indemnity [fol. 181] and disability provisions, but also the right to have those provisions rescinded in case of fraud, even though the period of limitations set forth in the incontestability clause had run if a suit at law had not previously been instituted. The incontestability clause would be meaningless and purposeless if we confine the appellant's right to contest liability thereunder to the limits of coverage set forth in sections 1 and 3. New York Life Insurance Co. v. Gatti, supra. That right it has without the excepting clause.

The order of the District Court is reversed and the case is remanded for further proceedings in accordance with this opinion.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 182] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1935

No. 5934

The Mutual Life Insurance Company of New York, Complainant-Appellant,

vs.

Carl F. Stroehmann and Lycoming Trust Co., Trustee, Respondents-Appellees

Appeal from the District Court of the United States, for the Middle District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Middle District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of July

2, 1935 of the said District Court in this cause be, and the same is hereby reversed, with costs, and the case is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Philadelphia, October 6, 1936.

J. Warren Davis, Circuit Judge.

Endorsements: Order Reversing Decree of July 2, 1935. Received & Filed Oct. 6, 1936. Wm. P. Rowland, Clerk.

[fol. 183] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Mutual Life Insurance Company of New York, Appellant, vs. Carl F. Stroehmann and Lycoming Trust Co., Trustee, Appellees, No. 5934, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 15th day of December, in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 184] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 1, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the question of the application and effect of the incontestability clause in policy No. 4,361,192.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
DEC 23 1936
CHARLES ELMORE CROP
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE,

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE H. HAFER,
GEO. ROSS HULL,
208-210 Walnut St.,
Harrisburg, Penna.;
CARL B. SHELLEY,
15 S. Third Street,
Harrisburg, Penna.,
Attorneys for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Statement of the case	2
Rulings of the court below	6
Questions presented	7
Reasons relied on for the allowance of the writ	8
Brief in support of petition for writ of certiorari	13
Opinions below	13
Jurisdiction	13
Statement of the case	13
Specification of errors	14
Argument	15
I.	
The decisions of the United States Circuit Courts of Appeal for the Fourth and Ninth Circuit are in irreconcilable conflict with that of the Third Circuit in this case with respect to the construction of the incontestability clause contained in Policy No. 3 and the Pennsylvania Supreme Court has not passed on the question	15
II.	
The ruling of the Circuit Court that notwithstanding the fact that by reason of Sec. 318 of the Pennsylvania Insurance Code of May 17, 1921, P. L. 682,701 (40 Purdon's Penna. Statutes Annotated, Sec. 441), the application for "Increasing Disability Benefits," not having been attached to Policies Nos. 1 and 2, was inadmissible in evidence to prove fraudulent statements therein, the respondent could show by parol testimony that such fraudulent statements were made, is	15

Page

(a) A decision on an important question of general law which is untenable, in conflict with weight of authority, and contrary to the express provisions of the policies; 15

(b) In conflict with the settled construction of the Supreme Court of Pennsylvania of Sec. 318 of the Pennsylvania Insurance Code of May 17, 1921, P. L. 682, 701 (40 Purdon's Penna. Statutes Annotated, Sec. 441) 15

III.

The ruling of the Circuit Court that respondent had expressly reserved the defense of fraud by a provision in the requests for changes in disability benefits, which requests were not attached to nor made part of either Policy No. 1 or Policy No. 2, is 24

(a) Decision on an important question of general law, untenable, in conflict with the weight of authority and contrary to the express provisions of the policy; 24

(b) In direct conflict with the settled construction of Sec. 318 of the Pennsylvania Insurance Code of May 17, 1921, P. L. 682 (40 Purdon's Penna. Statutes Annotated, Sec. 441); 24

(c) Untenable because the contestable period provided for in both Policies Nos. 1 and 2 had expired and insurer is estopped thereby from raising the defense of fraud 24

Conclusion 28

Appendix—Opinion of the United States Circuit Court of Appeals for the Third Circuit in the cases of Theresa M. Gatti et al. v. N. Y. Life Ins. Co. and John G. Ruhlin et al. v. N. Y. Life Ins. Co. 30

Table of Authorities Cited.

Cases:

	Page
Arnold v. *Equitable Life Assur. Soc.*, 228 Fed. 157	28
Brady v. *Prudential Ins. Co.*, 168 Pa. 645	28
Cohen v. *Metropolitan Life Ins. Co.*, 112 Pa. Super. 314	28
Dakota Life Ins. Co. v. *Midland Nat. Bank*, 18 F. (2d) 903	28
Feierman v. *Eureka Life Ins. Co.*, 279 Pa. 507	28
Fidelity Title & Trust Co. v. *Illinois Life Insurance Company*, 213 Pa. 415	20, 22, 23
Fidelity Title & Trust Co. v. *Metropolitan Life Ins. Co.*, 305 Pa. 296	11, 12, 20, 22, 23, 26
Fisher v. *Fidelity Mutual Life Ins. Co.*, 181 Pa. 1, 12	26
Gordon, Secretary of Banking v. *Continental Casualty Co.*, 311 Pa. 109	22
Gorski v. *Metropolitan Life Ins. Co.*, 88 Pa. Super. 326	28
Great Western Life Ins. Co. v. *Snavely*, 296 Fed. (C. C. A., 9th Cir.) 20	28
Hurt v. *New York Life Ins. Co.*, 51 F. (2d) (C. C. A., 10th Cir.) 936; affirmed on rehearing 53 F. (2d) 450, certiorari denied, 285 U. S. 541	28
Lawler v. *Home Life Ins. Co.*, 59 Pa. Super. 409	28
Mutual Life Ins. Co. of N. Y. v. *Markowitz*, 78 F. (2d) 396 (certiorari denied, 296 U. S. 625)	6, 9, 13
Ness v. *Mutual Life Ins. Co.*, 70 F. (2d) 59	6, 8, 9, 13
New York Life Ins. Co. v. *Gatti* (not reported, see Appendix)	13
New York Life Ins. Co. v. *Kaufman*, 78 F. (2d) 398 (certiorari denied 296 U. S. 626)	9
New York Life Ins. Co. v. *Ruhlin* (not reported, see Appendix)	10
New York Life Ins. Co. v. *Seymour*, 45 F. (2d) 47 (C. C. A. 6), annotated in 73 A. L. R. 1523	27
New York Life Ins. Co. v. *Truesdale*, 79 F. (2d) 481	8
Northwestern Mutual Life Ins. Co. v. *Pickering*, 293 Fed. (C. C. A., 6th Cir.) 496	28
Sipp v. *Phila. Life Ins. Co.*, 293 Pa. 292, at 298	20

Statutes:

Page

Pennsylvania Act of May 11, 1881, P. L. 20 ..... 11, 19, 26
Pennsylvania Statute of May 17, 1921, P. L. 682, Art. III, Sec. 318 (40 Purdon's Penna. Statutes Anno., Sec. 441) 5, 6, 8, 10, 12, 14, 15, 17, 19, 20, 25
Judicial Code, Sec. 240 (a), as amended by the Act of February 13, 1925 (43 Stats. 938; U. S. C. A., Sec. 347, page 359) 13

Texts:

Cooley's Briefs on Insurance (second edition), Vol. 2, page 1092 11
Couch-Cyclopedia of Insurance Law, Vol. I, Sec. 138, page 274 ..... 11, 18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE,

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Charles Evan Hughes, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The petition of Carl F. Stroehmann and Lycoming Trust Company, Trustee, petitioners (appellees below), respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Third Circuit to review the decree of that Court entered on October 6, 1936 (R. 179), reversing the decree of the District Court of the United States for

the Middle District of Pennsylvania entered on July 2, 1935 (R. 158), which dismissed without leave to amend the amended bill of complaint in which the respondent sought to cancel the disability benefits of certain policies of life insurance issued by the respondent because of alleged fraudulent representations in the applications therefor.

Statement of the Case.

The case having been heard upon a motion to dismiss the amended bill of complaint (R. 153-157), all of the facts appear in the amended bill (R. 3, R. 153).

The respondent, Mutual Life Insurance Company of New York, issued to Carl F. Stroehmann three policies of life insurance containing disability benefits on the following dates and in consideration of the following premiums:

No. 1.—On Sept. 20, 1919, Policy No. 2,646,105—face value $5,000—annual premium $112.50 including $4.50 for disability benefits. (Exhibit D of amended bill R. 33-70).

No. 2—On Dec. 9, 1919, Policy No. 2,677,078—face value, $5,000—annual premium $112.50 including $4.50 for disability benefits. (Exhibit E of amended bill R. 70-107).

No. 3—On June 30, 1930, Policy No. 4,361,192—face value $40,000—annual premium $1,370.00 including $238.00 for disability benefits (Exhibit G of amended Bill R. 118-152).

For convenience of reference, we shall hereinafter refer to these several policies as Nos. 1, 2 and 3, respectively.

The beneficiary of each of said policies was ultimately changed to Lycoming Trust Company, Trustee (R. 68, R. 105, R. 152).

Policies Nos. 1 and 2 were both issued upon a single written application and written declarations made to the medical examiner (in continuation of said application) and dated September 15, 1919, a copy of which was attached to each of these two policies (See Exhibit D, R. 60-67, and Exhibit E, R. 97-104, attached to the amended bill). No question is raised concerning the truth of any of the statements made in this application. Both of these policies contained on their third page provisions for "Benefits in the event of total and permanent disability before age 60."

On February 9, 1928, Stroehmann signed separate requests asking that each of these two policies be amended so as to cancel the old, and substitute new, disability provisions therein. These requests are Exhibits A and B attached to the amended bill of complaint (R. 20-23). In connection with these requests a single written application with written declarations to the company's medical examiner in continuation of said application was made. A copy of this application is attached to the amended bill as Exhibit C (R. 23-33).

Copies of these requests and of the application were not attached to the policies.

In accordance with these requests and relying on the application, the respondent on February 23, 1928 cancelled the original disability provisions in Policies Nos. 1 and 2 (R. 69, R. 106) and added to and made part of each policy provisions for "Increasing Disability Benefits" (R. 55-60; R. 92-97).

Policy No. 3 (Exhibit G, R. 118-152) was issued on June 30, 1930 upon a written application and written declarations to the medical examiner made in continuation of said application by Stroehmann at Norristown, Pennsylvania. A copy of this application and declarations to the medical examiner was attached to and made part of the policy (Exhibit F, R. 108-118).

On October 11, 1932, respondent filed its Bill of Complaint and sought therein to cancel—

(a) The "Increasing Disability Benefits" provisions attached to and made part of Policies Nos. 1 and 2 in accordance with the requests and applications hereinbefore referred to;

(b) The disability benefit provisions of Policy No. 3.

The basis on which this cancellation was sought was that insured had made certain alleged fraudulent misrepresentations with respect to medical attendance and illness in the applications therefor.

On May 17, 1934, the District Court for the Middle District of Pennsylvania, in an opinion written by Hon. Albert W. Watson, denied petitioner's motion to dismiss the bill of complaint and directed your petitioners to answer (R. 160-168), which your petitioners did.

On April 18, 1935, respondent having been granted leave to amend its bill so as to include additional alleged misrepresentations discovered since filing its original bill, amended its bill.

On May 16, 1935, your petitioners filed a motion to dismiss the amended bill of complaint (R. 153-157), which in substance was based on the following reasons:

(1) Respondent had an adequate remedy at law by way of defense to an action to recover for disability benefits.

(2) The Amended Bill of Complaint showed upon its face that the plaintiff had no cause of action against the defendant for the reason that—

(a) Policies Nos. 1 and 2 contained the following provision:

> "This policy shall be incontestable after two years from its date of issue except for non-payment of premiums" (R. 39, R. 76).

The "Increasing Disability Benefits" provisions sought to be cancelled by reason of alleged misrepresentations as to medical attendance and illness made in the application therefor were attached to and made a part of Policies Nos. 1 and 2 on February 23, 1928. The incontestable clause contained in Policies Nos. 1 and 2 began to run anew from the date of the amendment of the policies on February 23, 1928 and at the time of filing of the bill on October 11, 1932, the contestable period provided for in Policies Nos. 1 and 2 had expired and hence, they could not be contested on the ground of alleged misrepresentations made in the application for such amendment.

(b) The requests (Exhibits A and B, R. 20-23) for the change in disability benefits in Policies Nos. 1 and 2 and the application therefor (Exhibit C, R. 23-33) were not attached to and made part of Policies Nos. 1 and 2, in compliance with the *Pennsylvania Statute of May* 17, 1921, P. L. 682, Art. III, Sec. 318 (40 Purdon's Penna. Statutes, Sec. 441) and hence, the "Increasing Disability Benefits" attached to Policies Nos. 1 and 2 cannot be cancelled by reason of any agreements or alleged misrepresentations made therein.

(c) Policy No. 3 contained the following provision:

> "INCONTESTABILITY.—Except for non-payment of premiums and except for the restrictions and provisions applying to the double indemnity and disability benefits as provided in sections 1 and 3, respectively, this policy shall be incontestable after one year from its date of issue unless the insured die in such year, in which event it shall be incontestable after two years from its date of issue."

Policy No. 3 was issued June 30, 1930 and it appearing from the face of the amended bill that insured lived for more than one year from the date of issue of the policy, the policy became incontestable on June 30, 1931.

On October 11, 1932 after the expiration of the contestable period the bill was filed. As the bill did not contest the policy by reason of non-payment of premiums, nor by reason of any restriction or provision applying to the double indemnity and disability benefits as provided in Sections 1 and 3 of the policy, no contest on the ground of alleged misrepresentations in the application can be made since such contest was not excepted from the operation of the incontestable clause.

On July 2, 1935 the District Court, on authority of *Mutual Life Ins. Co. of New York* v. *Markowitz, et al.*, 78 F. (2d) 396, certiorari denied (296 U. S. 625), a decision of the Circuit Court of Appeals for the Ninth Circuit, and *Ness* v. *Mutual Life Ins. Co.*, 70 F. (2d) 59, a decision of the Circuit Court of Appeals of the Fourth Circuit, dismissed the bill without leave to amend.

On September 6, 1935, respondent appealed to the Circuit Court of Appeals for the Third Circuit and on October 6, 1936 that Court reversed the decree of the district court dismissing the bill and remanded the case for further proceedings.

Rulings of the Court Below.

The Circuit Court in its opinion reversing the decree of the District Court dismissing the amended bill, held that,—

(1) with respect to Policies Nos. 1 and 2:

(a) While the application for the "Increasing Disability Benefits," not having been attached to Policies Nos. 1 or 2, was, by reason of Secs. 318 and 410 (d) of the Insurance Code of Pennsylvania of May 17, 1921, P. L. 682 (40 Purdon's Penna. Statutes Annotated, Secs. 441 and 510) inadmissable in evidence to show fraudulent representations therein, such representations could be shown by parol evidence thereof.

(b) respondent reserved the defense of fraud in the requests for "Increasing Disability Benefits" notwith-

standing the fact that such requests were not attached to the policy and the policy provided that the policy and the application constituted the entire contract.

(2) with respect to Policy No. 3:

(a) that the incontestability clause permitted a contest of the disability benefit provisions on the ground of fraudulent misrepresentations in the application even though such contest is not included in the restrictions and provisions respecting disability as provided in Sections 1 and 3 of the policy.

From this decree this petition for certiorari is prosecuted.

Questions Presented.

1. Whether the insured not having died within one year from the date of issue of the policy, the insurer may contest, after the expiration of a year from the date of issuance of the policy, the disability provisions of a life insurance policy on the ground of alleged fraudulent misrepresentations in the application therefor where the incontestable clause contained in the policy provides—

> "Except for non-payment of premiums and except for the restrictions and provisions applying to the double indemnity and disability benefits as provided in sections 1 and 3 respectively, this policy shall be incontestable after one year from its date of issue unless the insured dies in such year, in which event it shall be incontestable after two years from its date of issue,"

and fraudulent misrepresentations in the application are not among the restrictions and provisions contained in sections 1 and 3 of said policy?

2. Whether the incontestable clause in a life insurance policy begins to run anew from the date of a supplemental

application for a change in disability benefits provided in such policy with respect to the representations made in such supplemental application?

3. Whether alleged fraudulent misrepresentations in an application for changes in the disability benefits of a life insurance policy can be proved by parol evidence when the application itself is inadmissable because not attached to the policy and because Sec. 318 of the *Pennsylvania Insurance Code of May* 17, 1921, P. L. 682, at 701 (40 *Purdon's Penna. Statutes Annotated,* Sec. 441) provides that when an application is not attached to a policy it shall not be received in evidence or considered a part of the contract?

4. Whether alleged fraudulent misrepresentations in an application for changes in the disability benefits of a life insurance policy can be proved by parol evidence when the application itself is inadmissable because not attached to the policy and the policy expressly provides that no statement in the application shall be used to avoid the policy unless the application is attached to the policy?

5. Whether a reservation of the defense of fraudulent statements in the request for changes in the disability benefits contained in a life insurance policy can be taken advantage of when such reservation is not attached to and made part of the policy and the policy expressly provides that the policy and the application attached thereto constitute the entire contract between the parties?

Reasons Relied on for the Allowance of the Writ.

A.

The decision in this case by the Circuit Court of Appeals for the Third Circuit is in irreconcilable conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the cases of *Ness* v. *Mutual Life Insurance Company of New York,* 70 F. (2d) 59, and *New York Life Insurance Company* v. *Truesdale,* 79 F. (2d) 481,

and with the decision of the United States Circuit Court of Appeals for the Ninth Circuit in the cases of *Mutual Life Insurance Company of New York* v. *Markowitz*, 78 F. (2d) 396 (certiorari denied 296 U. S. 625) and *New York Life Insurance Company* v. *Kaufman*, 78 F. (2d) 398 (certiorari denied 296 U. S. 626).

Policy No. 3 issued by respondent to your petitioner, Carl F. Stroehmann, contained the following incontestable clause:

> "Incontestability.—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

This incontestable clause is identical in language with that contained in the policy issued by the respondent in this case and involved in the cases of *Mutual Life Ins. Co. of N. Y.* v. *Ness*, 70 F. (2d) 59, and *Mutual Life Ins. Co. of N. Y.* v. *Markowitz*, 78 F. (2d) 396, certiorari denied 296 U. S. 625.

The United States Circuit Court of Appeals for the Fourth Circuit in the *Ness* case (*supra*) and for the Ninth Circuit in the *Markowitz* case (*supra*) both held that the incontestability clause quoted above precluded the respondent from asserting after the expiration of the incontestable period that the disability benefits were fraudulently procured and held that fraudulent representations in the application was not one of the provisions and restrictions contained in Sections 1 and 3 of the policy which respondent preserved by the exception in the incontestable clause.

The Third Circuit in this case declined to follow the *Ness* and *Markowitz* cases (*supra*) and came to a contrary conclusion.

The question has never been raised in, or decided by, the Supreme Court of Pennsylvania.

The Circuit Court in this case referred in its decision and relied upon its decision in *New York Life Ins. Co.* v. *Gatti* and *New York Life Ins. Co.* v. *Ruhlin,* decided the same day as the *Stroehmann* case but not yet reported. For the convenience of this Court, the relevant portion of the opinion in the *Gatti* and *Ruhlin* cases is set forth in the Appendix hereto. The Circuit Court concedes (Appendix page 33) that there is a conflict in the authorities, particularly with the *Ness* and *Markowitz* cases (*supra*) but declines to follow those cases.

B.

The Circuit Court refused to dismiss the amended bill as to Policies Nos. 1 and 2 and ruled (R. 178) that notwithstanding that *Sec.* 318 *of Art. III and Sec.* 410 (*d*) *of Article IV of the Pennsylvania Insurance Code of May* 17, 1921, P. L. 682, at 701 and 721 (40 Purdon's Penna. Statutes Annotated, Secs. 441 and 410) prohibited the proof of fraudulent statements in the application for the "Increasing Disability Benefits" contained in said policies by offering in evidence the application therefor, which had not been attached to said policies, the respondent could prove such statements at trial by other methods (*i. e.*, parol evidence of the same being made).

This ruling is a decision on an important question of general law and untenable because—

(a) In conflict with the express provision of Policies Nos. 1 and No. 2 which provide (R. 39 and R. 77) that no statement of the Insured shall avoid the policy unless contained in the written application attached to or endorsed on the policy. The application for "Increasing Disability Benefits" contained in Policies Nos. 1 and 2 not having been attached thereto, no statement therein can be used to avoid the policy;

(b) In conflict with the weight of authority which holds that where an application is inadmissable the contents thereof also are inadmissable and not subject to proof by parol evidence. *Couch-Cyclopedia of Insurance Law* Vol. 1, Sec. 138, page 274; *Cooley's Brief on Insurance* (Second Edition), Vol. 2, page 1092;

(c) In conflict with the settled construction of *Sec.* 318 *of the Insurance Code of Pennsylvania* as construed by the Supreme Court of Pennsylvania. In *Fidelity Title & Trust Co.* v. *Illinois Life Ins. Co.*, 213 Pa. 415 and *Fidelity Title & Trust Co.* v. *Metropolitan Life Ins. Co.*, 305 Pa. 296 the Supreme Court of Pennsylvania held that the *Act of May* 11, 1881, *P. L.* 20, which is re-enacted by *Sec.* 318 *of the Insurance Code of Pennsylvania,* not only makes an application, not attached to a policy, inadmissable in evidence to prove fraudulent statements made therein but also makes parol evidence or other proof of such statements inadmissible.

C.

The Circuit Court ruled (R. 176) that respondent had expressly reserved the defense of fraud by a provision in the requests for changes in disability benefits, notwithstanding the fact that these requests were not attached to, nor made part of either Policies Nos. 1 or 2. This ruling is a decision on an important question of general law and untenable because—

(a) It is in conflict with the express provisions of Policies Nos. 1 and 2 and with the weight of authority. Both policies provide that the policy and application therefor constitute the entire contract. The ruling of the Circuit Court that respondent had reserved in the requests for changes in disability benefits the defense of fraud is in direct conflict with these express provisions. Not only is it in direct conflict with these express provisions but it is contrary to the

weight of authority and the elementary proposition of law that whatever is intended to be made a part of a written contract of insurance should be inserted in the policy or incorporated therein by reference. *Couch Cyclopedia of Insurance Law*, Vol. 1, Sec. 134, page 260;

(b) Such ruling is in direct conflict with the settled construction of *Sec. 318 of the Insurance Code of Pennsylvania* (40 Purdon's Penna. Statutes Annotated Sec. 441); *Fidelity Title & Trust Co. v. Metropolitan Life Insurance Co.*, 305 Pa. 296;

(c) The contestable period provided for in both Policies Nos. 1 and 2 had expired and the insurer is estopped thereby from raising the defense of fraud. The incontestable clause contained in Policies Nos. 1 and 2, as to statements in the application for the "Increasing Disability Benefits" attached to said policies, began to run anew from the date of the attaching of such provisions.

D.

While the order of the Circuit Court remands the case for trial, since the legal questions raised dispose of the whole controversy before the court, the writ should be allowed without further protracting the litigation to the extent necessary to reach a final decree.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit, should be granted.

CARL F. STROEHMANN AND
LYCOMING TRUST COMPANY, Trustee,
By GEORGE H. HAFER,
GEO. ROSS HULL,
CARL B. SHELLEY,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The first opinion of the District Court refusing petitioners' motion to dismiss the bill is reported in 6 F. Supp. 953. The second opinion of the district court reversing its first opinion on authority of *Ness.* v. *Mutual Life Ins. Co. of N. Y.*, 70 F. (2d) 59 and *Mutual Life Ins. Co. of N. Y.* v. *Markowitz*, 78 F. (2d) 396, certiorari denied 296 U. S. 625, is not yet reported but is found at pages 158-159 of the record. The opinion of the Circuit Court of Appeals reversing this opinion is not yet reported but is found at pages 174-179 of this record.

The relevant portion of the opinion of the Circuit Court of Appeals in the case of *New York Life Ins. Co.* v. *Gatti* and *New York Life Ins. Co.* v. *Ruhlin*, decided by the Circuit Court of Appeals for the Third Circuit on the same day as the *Stroehmann* case and relied on in the *Stroehmann* case, is not yet reported but is printed in the appendix hereto.

II.

Jurisdiction.

The jurisdiction of this court is invoked under *Sec.* 240 (*a*) *of the Judicial Code*, as amended by the *Act of Feb.* 13, 1925 (43 Stats. 938; U. S. C. A. Section 347, page 359).

The date of the decree of the Circuit Court of Appeals now sought to be reviewed is October 6, 1936 (R. 180).

III.

Statement of the Case.

The essential facts of the case are fully set forth in the accompanying petition for certiorari (Petition, page 2) and in the interest of brevity, are not repeated here.

IV.

Specification of Errors.

(a) The Circuit Court of Appeals erred in reversing the decree of the District Court dismissing the bill and remanding the case to the District Court for trial.

(b) The Circuit Court of Appeals erred in holding (R. 178-179) that the expiration of the period provided for in the incontestable clause in Policy No. 3 did not preclude the respondent from contesting the validity of the disability provisions contained therein on the ground of fraud in the procurement thereof.

(c) The Circuit Court of Appeals erred in holding (R. 177-178) that fraudulent statements in the application for "Increasing Disability Benefits" contained in Policies Nos. 1 and 2, may be proved by parol evidence, although the application itself was inadmissible to prove such fraudulent statements by reason of *Sec.* 318 *of Art. III of the Insurance Code of Pennsylvania of May* 17, 1921, P. L. 682, 701 (40 Purdon's Penna. Statutes Annotated, Sec. 441) and the fact that the application therefor was not attached to either policy.

(d) The Circuit Court of Appeals erred in holding (R. 176) that the respondent had expressly reserved in the requests for changes in the disability benefits, which were not attached to Policies Nos. 1 and 2, the defense of fraud in the application for such changes.

(e) The Circuit Court of Appeals erred in not holding that, as to statements in the application for "Increasing Disability Benefits" contained in Policies Nos. 1 and 2, the incontestable clause began to operate anew from the date of such application, and, having expired, prevented a contest

on the ground of alleged fraudulent statements contained therein.

V.

ARGUMENT.

I.

The decisions of the United States Circuit Courts of Appeal for the Fourth and Ninth Circuit are in irreconcilable conflict with that of the Third Circuit in this case with respect to the construction of the incontestability clause contained in Policy No. 3 and the Pennsylvania Supreme Court has not passed on the question.

That there is this conflict in the decisions of the various Circuit Courts of Appeal and that the Circuit Court in this case concedes such conflict, clearly appears from the discussion set forth under Reason "A" of the "Reasons Relied on for the Allowance of the Writ" (pages 8-12 of the Petition) and in the interest of brevity is not repeated here.

II.

The ruling of the Circuit Court that notwithstanding the fact that by reason of Sec. 318 of the Pennsylvania Insurance Code of May 17, 1921, P. L. 682, 701 (40 Purdon's Penna. Statutes Annotated, Sec. 441), the application for "Increasing Disability Benefits," not having been attached to Policies Nos. 1 and 2, was inadmissible in evidence to prove fraudulent statements therein, the respondent could show by parol testimony that such fraudulent statements were made, is

(a) *a decision on an important question of general law which is untenable, in conflict with weight of authority, and contrary to the express provisions of the policies;*

(b) *in conflict with the settled construction of the Supreme Court of Pennsylvania of Sec.* 318 *of the Pennsyl-*

vania Insurance Code of May 17, 1921, P. L. 682, 701 (40 *Purdon's Penna. Statutes Annotated, Sec.* 441).

Policies Nos. 1 and 2 were issued to Carl F. Strochmann, the insured, on September 20, 1919, and December 9, 1919, and copies of these policies are attached to the Amended Bill of Complaint and marked Exhibits D and E (R. 33-70 and R. 70-107).

No question is raised in the amended bill of complaint concerning the truth of any of the statements made in the applications for these policies as issued on September 20, 1919 and December 9, 1919.

On February 9, 1928, insured signed separate requests for change in the disability benefits of each of said policies. These requests are attached to the amended bill and marked Exhibits A and B, respectively (R. 20, R. 21). *They were not attached to or made part of the policy.*

In connection with these requests a single written application and declarations to the medical examiner in continuation thereof was made by the insured on February 11, 1928, at Williamsport, Pennsylvania. A copy of this application is attached to the amended bill and marked Exhibit C (R. 23-33).

A copy of this application was not attached to nor made part of either Policy No. 1 or Policy No. 2.

Pursuant to the above requests and application, the respondent on February 23, 1928, cancelled the disability benefit provisions as contained in Policies Nos. 1 and 2, when issued in 1919, and attached to each of said policies, provisions for "Increasing Disability Benefits" (R. 55-60; R. 92-97).

The amended bill of complaint filed by respondent seeks to cancel these provisions for "Increasing Disability Benefits" on the ground of alleged fraudulent misrepresentations made in the application for such provisions, which

application was not attached to nor made part of Policy No. 1 or Policy No. 2.

The Circuit Court ruled (R. 177-178) that the *Pennsylvania Statute of May* 17, 1921, P. L. 682, Art. III, Sec. 318 and Art. IV, Sec. 410 (d) (40 Purdon's Penna. Statutes Annotated, Sec. 441 and 510) prohibited the respondent from proving fraud by introducing in evidence the application for "Increasing Disability Benefits" which was not attached to or made part of Policies Nos. 1 or 2.

Notwithstanding this ruling, the Court further ruled that although respondent cannot prove fraudulent statements in the application therefor by introducing the application in evidence, it could have the "Increasing Disability Benefits" cancelled and rescinded if it is able to prove the fraudulent statements in the application without placing the application in evidence and therefore, the court refused to dismiss the bill as to Policies Nos. 1 and 2.

(a)

This ruling, that, although alleged fraudulent statements in the application cannot be proved by introducing in evidence the application they can be proved by parol evidence, is untenable, in conflict with the weight of authority and contrary to the express provisions of the policies.

Both Policy No. 1 (R. 39) and Policy No. 2 (R. 77) contained the following provision:

> "The Contract.—This Policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, *and no such statement of the Insured shall avoid or be used in defense to a claim under this Policy unless contained in the written ap-*

plication herefor and a copy of the application is endorsed on or attached to this Policy when issued" (R. 39, R. 77). (Italics ours.)

Accordingly, we submit, that to permit respondent to seek to avoid Policies Nos. 1 and 2 by proof of alleged fraudulent statements in the application therefor, when such application has not been attached to or made a part of either policy, is prohibited by and contrary to the express provisions of the contract between the parties.

Not only does the express provision of the policy prohibit the use of any statement in an application not attached to the policy in order to avoid the policy but the weight of authority is that such use is prohibited.

In *Cooley's Briefs on Insurance* (Second Edition), Vol. 2, page 1092, the following general principle supported by the citation of a great number of authorities (including Pennsylvania) is laid down:

> "The failure of the insurer to comply with the statute not only renders the application itself inadmissible in evidence on its behalf to show misrepresentation by the insured, but parol evidence cannot be admitted to show that insured made false statements therein."

The same principle is stated in *Couch, Cyclopedia of Insurance Law,* Vol. 1, Sec. 138, page 274, where it is said:

> "Many jurisdictions now have statutes which require that the application, or a copy thereof, be annexed to, incorporated in, indorsed on or referred to, in the policy, or that the constitution, by laws, etc., of benefit associations, are a part of the contract between it and a member, or that the contract shall consist of the application, certificate, charter, constitution, by laws, etc. Such statutes when applicable, establish a rule of substantive law which becomes a part of the contract, and, as a consequence, the application must be incorporated in the policy to be a part thereof. *In*

*fact such a statute must be complied with; otherwise the application and all testimony relating thereto will be excluded from evidence in aid of the policy although the statute does not expressly provide that a failure to comply with the requirement shall render the contents of the application inadmissible in evidence. * * * Of course where the application is not admissible its contents cannot be shown by parol evidence * * *.*" (Italics ours.)

Numerous authorities are cited in support of this proposition in Couch, including a great many Pennsylvania cases.

(b)

Not only is the ruling of the Circuit Court contrary to the weight of authority and the express provisions of Policies Nos. 1 and 2 but it is in direct conflict with the settled construction of Sec. 318 of the Pennsylvania Insurance Code of May 17, 1921, P. L. 682, 701 (40 Purdon's Penna. Statutes Annotated, Sec. 441).

The *Pennsylvania Act of May* 11, 1881, P. L. 20, provided:

"That all life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence in any controversy between the parties to or interested in, the said policy,

nor shall such application or by-laws be considered a part of the policy or contract between such parties." (Italics ours.)

This act was substantially re-enacted by *Sec.* 318 *of the Pennsylvania Insurance Code of May* 17, 1921, P. L. 682, 701 (40 Purdon's Penna. Statutes Annotated, Sec. 441), which provides:

"All insurance policies, issued by stock or mutual insurance companies or associations doing business in this State, in which the application of the insured, the constitution, by-laws, or other rules of the company form part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application as signed by the applicant or the constitution, by-laws, or other rules referred to; and, unless so attached and accompanying the policy, no such application, constitution, or by-laws, or other rules shall be received in evidence in any controversy between the parties to, or interested in, the policy, nor shall such application, constitution, by-laws, or other rules be considered a part of the policy or contract between such parties."

That the Act of 1921 (*supra*) substantially re-enacts the Act of 1881 (*supra*), see *Fidelity Title & Trust Co.* v. *Metropolitan Life Ins. Co.*, 305 Pa. 296.

Accordingly, the decisions of the Pennsylvania Supreme Court interpreting the Act of 1881 are binding precedents for the construction of the Act of 1921 unless a difference results from a change in the act. With respect to applications for a policy, no such change appears as it does with respect to rules of the company. (See *Sipp* v. *Phila. Life Ins. Co.*, 293 Pa. 292, at 298, pointing out this change as to rules.)

The Pennsylvania Supreme Court in the case of *Fidelity Title and Trust Co.* v. *Illinois Life Ins. Co.*, 213 Pa. 415,

expressly held that where an application which has not been attached to an insurance policy and is therefore in accordance with the Act of 1881 (*supra*) not admissible in evidence, proof of the alleged falsity of statements made therein is also inadmissible. The lower court, after having held that an application for a life insurance policy was inadmissible in evidence by reason of the Act of 1881 because it had not been attached to the policy, refused an offer to show by the oral testimony of the medical examiner that the statements in the application were false. The Supreme Court of Pennsylvania, in affirming this rejection of the offer to prove the falsity of statements in the application where the application itself was inadmissible, said (213 Pa. at 426):

> "This offer conflicts directly with the Act of May 11, 1881, P. L. 20, relating to life and fire insurance policies. It is there provided that the application shall not be considered a part of the policy or contract between the parties, unless a correct copy of such application be attached to the policy, and the application in this case was not attached. In the affidavit of defense it was admitted that a written application had been made, in which the very thing here proposed to be shown was inquired of, and written answers in response obtained from the insured. It is to make the act of no effect, to say that it excludes the paper being considered a part of the contract between the parties, but allows proof of what it contains for that very purpose; not only so, but it reverses the established order of proof that always regards the written document as the first and best evidence of the contract, and excludes all other until the writing be introduced, or its absence accounted for. There was no error in the rejection of the evidence."

The Supreme Court of Pennsylvania in the recent case of *Fidelity Title & Trust Co.* v. *Metropolitan Life Ins. Co.*, 305

Pa. 296 (1931), followed the *Illinois Life Ins. Co.* case from which we have quoted above.

The Circuit Court declined to follow the *Illinois Life Ins. Co.* case (*supra*). On authority of *Gordon, Secretary of Banking* v. *Continental Casualty Co.*, 311 Pa. 109, the Circuit Court held that if respondent could prove the alleged false statements in the application without offering in evidence the application, it may do so and on this basis, refused to dismiss the bill as to Policies Nos. 1 and 2.

It is true that the Pennsylvania Supreme Court did say there (311 Pa. at 113):

> "If it be thought that the first part which says that 'No statement made in the application for this bond or otherwise * * *' should operate to exclude the entire section from consideration, because the application was not attached to the policy, it would suffice to say, in the first instance, that section 318 of 'The Insurance Company Law of 1921,' which deals with this subject, does not exclude proof of the fact, but only excludes its proof by the application itself, if not attached to the policy. Whether or not the fact can be otherwise proved, will be known when the case is tried in due course. If, in applying for the bond, the statement as to the honesty of the employees, whose fidelity was to be insured, was 'otherwise submitted' to defendant, than in the application for the bond, and its inaccuracy is proved on the trial, the misstatement thus made may be a complete defense to this suit on the bond."

We submit that the decision of the Supreme Court of Pennsylvania in no way affects the authority of the *Illinois Life* case (213 Pa. 415) and the *Metropolitan* case (305 Pa. 296) because—

(a) the court also said in its opinion (311 Pa. at 112):

> "Plaintiff moved for judgment for want of a sufficient affidavit of defense, which the court below made

absolute, because, under Section 318 of 'The Insurance Company Law of 1921,' P. L. 682, 701, the application was not admissible in evidence or to be considered a part of the contract, even on a rule for a summary judgment, because it had not been attached to the bond when it was issued by defendant. *Whether or not this conclusion was correct was the subject of much contention here, but we will not decide the point at this time;"* (Italics ours.)

(b) the court in the *Continental Casualty* case had before it a bond which said "No statement made in the application for this bond *or otherwise"* (see extract *supra*) and was passing on this language and not the Act of 1881 alone; and

(c) the Supreme Court of Pennsylvania when this same case was again before it held that the Act of 1881 had no application to the case because the case involved a bond and the Act of 1881 does not include bonds. *Gordon, Secretary of Banking* v. *Continental Casualty Company*, 319 Pa. 555.

Accordingly, it is clear that what was said in the *Continental Casualty* case in 311 Pa. 113 is *dictum* and should not be followed in view of the applicable decisions in the cases of *Illinois Life Ins. Co.* (213 Pa. 415), and *Metropolitan Life Ins. Co.* (305 Pa. 296).

We submit that the Circuit Court on the weight of authority, the express provisions of the contract and the settled construction of the Pennsylvania Insurance Code should have held that where an unattached application is inadmissible to prove alleged fraudulent statements therein, parol evidence to the same effect is inadmissible, and hence, should have dismissed the amended bill as to Policies No. 1 and No. 2.

III.

The ruling of the Circuit Court that respondent had expressly reserved the defense of fraud by a provision in the requests for changes in disability benefits, which requests were not attached to nor made part of either Policy No. 1 or Policy No. 2, is:

(a) *decision on an important question of general law, untenable, in conflict with the weight of authority and contrary to the express provisions of the policy;*

(b) *in direct conflict with the settled construction of Sec.* 318 *of the Pennsylvania Insurance Code of May* 17, 1921, *P. L.* 682 (40 *Purdon's Penna. Statutes Annotated Sec.* 441);

(c) *untenable because the contestable period provided for in both Policies Nos.* 1 *and* 2 *had expired and insurer is estopped thereby from raising the defense of fraud.*

Each of the written requests for changes in disability benefits in Policies Nos. 1 and 2, which were executed by the insured at Williamsport, Pennsylvania, on February 9, 1928 and copies of which appear in the amended bill as Exhibits A and B (R. 20, R. 21), provided, *inter alia* (R. 21 and R. 22):

> "That if the above statements as to occupation or travel or the statements or answers in said medical examination shall be in any respect untrue, or if any Disability Benefits shall be claimed and if it shall appear that disability originated before the date of the granting of this request, any disability benefits granted under said policy shall be only those, if any, provided for in said policy before the change herein requested was made."

The Circuit Court ruled (R. 176) that this provision contained in the requests for changes in the disability benefit

provisions of Policy No. 1 and Policy No. 2 as originally issued reserved the defense of fraud to the insurer.

The provisions contained in the requests for changes in Policy No. 1 and Policy No. 2 were not attached to, nor endorsed on, either Policy No. 1 or Policy No. 2.

Although the above provisions were not attached to nor endorsed on Policies Nos. 1 or 2, the Circuit Court ruled (R. 176) that they reserved the defense of fraud to the insurer.

(a)

Such ruling is untenable being in conflict with the weight of authority and the express provisions of the policies.

Both Policy No. 1 (R. 39) and Policy No. 2 (R. 77) contain the following provision:

> "The Contract.—This policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto."

In the light of this provision, we submit that if the respondent desired to make these provisions part of Policies Nos. 1 and 2, it is Hornbook Law that they should have been attached to, endorsed on or referred to in such policies.

In Couch "Cyclopedia of Insurance Law," Vol. 1, Sec. 134, page 260, the general principle is stated as follows:

> "It is elementary law that whatever is intended to be made part of a written contract of insurance should be inserted in the policy or incorporated therein by attachment and proper words of reference."

(b)

Such ruling is in direct conflict with Sec. 318 of the Pennsylvania Insurance Code of May 17, 1921, P. L. 682, (40 Purdon's Penna. Statutes Annotated, Sec. 441).

We have seen (this brief, page 20) that Sec. 318 of the Insurance Code of Pennsylvania in all particulars relating

to applications for an insurance policy re-enacted the Pennsylvania Act of 1881, P. L. 20.

That under these acts, it is necessary to have the whole application attached to a policy to be considered a part thereof is apparent from the following Pennsylvania cases:

Fisher v. *Fidelity Mutual Ins. Co.*, 181 Pa. 1, 12;

Fid. T. and T. Co. v. *Metropolitan Life Ins. Co.*, 305 Pa. 296.

That the act applies to supplemental applications or amendments to applications clearly appears from the above cases. In *Fid. T. and T. Co.* v. *Metropolitan Life Ins. Co.*, 305 Pa. 296, at 301, the Supreme Court of Pennsylvania said:

> "Even if the 'amendment forms,' by which defendant intended to have the old application apply to this policy, had been signed by Browarsky, it would have been unavailing, since they were not attached thereto. This is squarely ruled in Fisher *v.* Fidelity Mutual Life Association of Phila., 188 Pa. 1, 12, where we said: 'It clearly appeared in evidence that there was a supplemental application which was not attached to or indorsed on the policy. * * * The omission of this from the policy was a failure to comply with the Act of 1881. The act requires that a copy of the entire application—not merely a part thereof,—shall be attached. The omission of a part, which of course includes a supplementary part, operates to exclude the whole. The statute must be interpreted in the spirit in which it was enacted,' that is, 'to produce a uniform rule of procedure' (Hebb *v.* Kittaning Mutual Fire Ins. Co., 138 Pa. 174, 180), 'and its provisions should be strictly enforced': Pickett *v.* Pacific Mutual Life Ins. Co., 144 Pa. 79, 94. The Act of 1881, above referred to, is that of May 11, 1881, P. L. 20, and appellant admits it is substantially re-enacted by section 318 of the Insurance Code of May 17, 1921, P. L. 682, 701, which was in force when this insurance was effected, and therefore, he

says, the 'decisions construing the earlier enactment are applicable to that now in force.' Indeed the Act of 1921 is broader than that of 1881, but the differences are unimportant here."

(c)

Such ruling is untenable. The contestable period provided for in both Policies Nos. 1 and 2 had expired and insurer is estopped thereby from raising the defense of fraud.

Both Policy No. 1 (R. 39) and Policy No. 2 (R. 76) contain the following clause:

> "Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premiums" (R. 39, R. 76).

The amended bill seeks to cancel the "Increasing Disability Benefits" on the ground of fraudulent statements in the application for such benefits. At the time such benefits were applied for and attached to Policy No. 1 and Policy No. 2, the contestable period for the original application had long since expired.

We submit that this period began to run anew as to statements in the application for "Increasing Disability Benefits" and since the contestable period had also expired as to such statements, Policies Nos. 1 and 2 are incontestable as to such statements.

While we have been unable to find any authorities on the question of the incontestable clause beginning to operate anew as to supplemental and amending applications, we submit that the authorities which hold that the incontestable clause begins to operate anew as to statements in an application for reinstatement are applicable by analogy and logic. Typical of this is the leading case of *New York Life Ins. Co.* v. *Seymour,* 45 F. (2d) 47 (C. C. A. 6), Annotated, in 73 A. L. R. 1523, and the cases cited in such annotation.

The Pennsylvania courts have uniformly held that the defense of fraudulent representations is precluded by the expiration of the contestable period.

Lawler v. *Home Life Ins. Co.*, 59 Pa. Super. 409;
Brady v. *Prudential Ins. Co.*, 168 Pa. 645;
Feierman v. *Eureka Life Ins. Co.*, 279 Pa. 507;
Cohen v. *Metropolitan Life Ins. Co.*, 112 Pa. Super. 314;
Gorski v. *Metropolitan Life Ins. Co.*, 88 Pa. Super. 326.

The Federal courts have followed the same rule.

Great Western Life Ins. Co. v. *Snavely*, 206 Fed. (C. C. A. 9th Cir.) 20;
Arnold v. *Equitable Life Assur. Soc.*, 228 Fed. 157;
Dakota Life Ins. Co. v. *Midland Nat. Bank*, 18 F. (2d) 903;
Northwestern Mutual Life Ins. Co. v. *Pickering*, 293 Fed. (C. C. A. 6th Cir.) 496;
Hurt v. *New York Life Ins. Co.*, 51 F. (2d) (C. C. A. 10th Cir.) 936; affirmed on rehearing 53 F. (2d) 450, certiorari denied, 285 U. S. 541.

We submit that Policies Nos. 1 and 2 being incontestable and the defense of fraudulent representations being thereby precluded, the holding of the Circuit Court that the defense of fraud was reserved is untenable. Even if this reservation is effective, although not attached to Policies Nos. 1 and 2, it is subject to the incontestable clause contained in such policies and is rendered inoperative by the expiration of the time provided in such clauses.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected, that the questions raised are questions of law

and your petitioners should not be compelled to further protract the litigation by a trial, wherein the same questions of law would be raised, solely for the purpose of securing a final decree, and that the judgment of the United States Circuit Court of Appeals for the Third Circuit should be reversed in order that justice may be done to petitioner; and that to such end a writ of certiorari should be granted to review the decision of the Circuit Court and reverse the same and dismiss the amended bill of complaint.

Respectfully submitted,

GEORGE H. HAFER,
GEO. ROSS HULL,
CARL B. SHELLEY,
Counsel for Petitioners.

APPENDIX.

(Opinion of the United States Circuit Court of Appeals for the Third Circuit, Handed Down on the Same Day as the Opinion in the Stroehmann Case and Relied Upon by the Circuit Court in Its Disposition of the Stroehmann Case (R. 179)).

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

OCTOBER TERM, 1935.

No. 5938.

THERESA M. GATTI, in Her Own Right and as Guardian of the Estate of Yolanda J. Gatti, *Respondent-Appellant*,

v.

NEW YORK LIFE INSURANCE COMPANY, *Complainant-Appellee.*

OCTOBER TERM, 1935.

No. 5939.

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, WILLIAM R. RUHLIN and JEAN L. RUHLIN, *Respondents-Appellants*,

v.

NEW YORK LIFE INSURANCE COMPANY, *Complainant-Appellee.*

Appeals from the District Court of the United States for the Western District of Pennsylvania.

OPINION.

(Filed October 6, 1936.)

Before Davis and Thompson, Circuit Judges, and Watson, District Judge.

DAVIS, *Circuit Judge:*

Both cases in these appeals from the District Court involve identical questions of law.

On September 9, 1935, the New York Life Insurance Com-

pany insured the life of Yolanda J. Gatti, a citizen of Pennsylvania, for $5,000. In addition to insuring the life of Gatti, the policy contained a clause granting certain benefits in the event she became totally disabled.

She later suffered from dementia praecox, or a manic depressive psychosis, and applied for the benefits under the total disability clause. The Insurance Company paid $1,850 thereunder to the insured, or her guardian, Theresa Gatti. On November 20, 1934, after some investigation, it notified her and Theresa Gatti, that it had elected to rescind those parts of the contract of insurance which covered benefits for total disability and double indemnity, alleging that the insured had made certain false and fraudulent misrepresentations in the application for the insurance, and tendered the amount of the premiums paid under those clauses. They refused the tender and instituted proceedings against the Insurance Company to collect further payments, which they claimed to be due, of the total disability benefits, in the Common Pleas Court of Jefferson County, Pennsylvania.

On December 1, 1928, the Insurance Company issued two like policies of insurance on the life of John G. Ruhlin, a citizen of Pennsylvania, one policy for $10,000, and the second for $5,000. On July 7, 1930, it issued three more similar policies on the life of Ruhlin, each for the face value of $4,000. All of these policies contained clauses granting total disability and double indemnity benefits. On November 1, 1934, Ruhlin presented a claim for benefits for total disability. The Insurance Company refused this application, notified him that it had elected to rescind the policies in so far as they granted disability and double indemnity benefits on the ground of fraud, and tendered the amount of the premiums up to that time paid. The appellant refused the tender and also instituted suit in the Common Pleas Court of Jefferson County, Pennsylvania, to collect the benefits which he claimed to be due him under the policy.

On January 9, 1935, the Insurance Company filed a bill of complaint against Yolanda and Theresa Gatti, and on February 14, 1935 it filed a similar bill against John G. Ruhlin and the beneficiaries named in the policies. The bills contain several questions and answers made in the medical examination in connection with the applications for

insurance; allege these answers to be false and fraudulent; set forth certain allegations of fact indicating wherein the answers were false and fraudulent; pray that the provisions in the policies relating to total disability and double indemnity benefits be rescinded; and that the defendants be enjoined from instituting or prosecuting any action under these provisions.

The District Court entered decrees granting preliminary injunctions and from these decrees the defendants appealed.

All the policies involved contain the following "incontestability" clause:

> "This policy shall be incontestable after two years from its date of issue except for the non-payment of premiums, and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The first question raised by these appeals is whether or not the Insurance Company has the right, after expiration of two years from the date of the policies, to rescind the provision for double indemnity and disability benefits because of fraud practiced in procuring the insurance.

This question has never to our knowledge been decided by the United States Supreme Court, and the state and federal courts which have passed upon it are not in accord.

The United States Circuit Court of Appeals for the Fifth Circuit in the case of Pyramid Life Insurance Co. *v.* Selkirk, 80 Fed. (2d) 553, held that the insurer had the right to rescind for fraud the provisions relating to disability and double indemnity benefits in a contract of insurance containing an incontestability clause substantially the same as the one in the case at bar.

The United States District Court for the Western District of Pennsylvania in the case of New York Life Insurance Company *v.* Davis, 5 Fed. Sup. 516 reached the same conclusion. So have the state courts in the states of New York, Connecticut, Pennsylvania, Maryland, Mississippi, Arizona, Washington and Tennessee.

We are concerned here with the "provisions and conditions" relating to disability. Leaving out the parts not material here, the excepting clause reads: "This policy

shall be incontestable after two years from its date of issue * * * except as to provisions and conditions relating to disability benefits". It was clearly the purpose of the Insurance Company to except the provisions creating the obligation to pay these benefits from the incontestable provisions obligating it to pay insurance on the life of the insured. The policy clearly sets out the provisions and conditions relating to disability benefits and in definite and comprehensive language the excepting clause excludes these from the incontestability provisions.

But the United States Circuit Court of Appeals for the Fourth Circuit in the cases of Ness *v.* Mutual Life Insurance Company of New York, 70 Fed. (2d) 59, and New York Life Insurance Company *v.* Truesdale, 79 Fed. (2d) 481, and the Circuit Court of Appeals for the Ninth Circuit in the cases of Mutual Life Insurance Co. of New York *v.* Markowitz, 78 Fed. (2d) 396, and New York Life Insurance Company *v.* Kaufman, 78 Fed. (2d) 398, together with one or two state courts have reached a contrary conclusion. They hold that the exception in the incontestability clause applies to the *"provisions and conditions"* relating to disability and double indemnity benefits and not to the benefits themselves. For this reason, they say, the insurance company may not defend against a claim for disability benefits on the ground of fraud practiced in the procurement of the insurance if the period of limitation has expired.

We think this construction is untenable for two reasons: 1. The company may always, without an exception in the incontestability clause, contest the question as to whether or not a particular claim is covered by the policy. The question is purely one of coverage. That is, whether or not the insured has complied with the particular provisions or conditions entitling him to benefits. Metropolitan Life Assurance Co. *v.* Conway, 252 N. Y. 449; Smith *v.* Equitable Life Assurance Society, 89 S. W. (2d) (Tenn.) 165. 2. The exception here does not intend to distinguish between the "provisions and conditions" relating to benefits and the benefits themselves. These terms, "provisions and conditions", are comprehensive of the subject to which they relate. Smith *v.* Equitable Life Assurance Society, *supra.*

The expression "provisions and conditions relating to disability benefits" even if tautological, embraces all matters relating to liability for such benefits. When these terms are combined nothing else relating to liability for disability benefits remains for consideration. Both are excepted from the operation of the incontestability clause. Pyramid Life Insurance Co. *v.* Selkirk, *supra*. The language is clear and definite and the parties perfectly well understood it or with ordinary intelligence should have understood it. The exception is stated in such language as not to permit a person deliberately to misrepresent the facts and practice fraud on the company for his personal advantage and then hide behind a refined construction of the language employed.

* * * * * * *

(NOTE.—The remaining portion of the Opinion is devoted to the question of whether or not the District Court erred in enjoining the prosecution of the actions for disability benefits in the State Court and not being applicable to the questions raised in this petition, is not printed here, in the interest of brevity).

FILE COPY

FILED
MAR 2 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE,

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

GEORGE H. HAFER,
GEO. ROSS HULL,
208-210 Walnut St.,
Harrisburg, Penna.;
CARL B. SHELLEY,
15 S. Third Street,
Harrisburg, Penna.,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Opinions below	2
Jurisdiction	2
Statement of the case	3
Question presented	6
Specification of error	7
Argument:	
A. The provision that an insurance policy shall be incontestable after the expiration of a specified period means, that, thereafter within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken	7
B. The defense of fraudulent representations in the application for a policy is a defense based on the validity of the policy at inception and hence, unless excepted from the operation of the incontestable clause, is precluded thereby	11
C. The incontestable clause contained in Policy No. 3 (Policy No. 4,361,192) did not except fraudulent statements in the application for the policy	16
D. Neither a provision of the insurance laws of the State of New York, nor the reason for the enactment of the same, is applicable to the interpretation of the incontestable clause contained in Policy No. 3 (Policy No. 4,361,192)	36
E. The insurer having used, in the creation of the exception from the incontestable clause, language which is uncertain, ambiguous, and requires interpretation because susceptible to two or more different, but sensible or reasonable, constructions, that construction which is most favorable to the insured must be adopted	43

Page

F. The interpretation of the incontestable clause urged by petitioners does not condone fraud, nor work a great injustice to life insurance companies 44

Conclusions 51

Cases: AUTHORITIES CITED.

Arnold v. *Equitable Life Assur. Soc.*, 228 Fed. 157 (District Court, S. D. Iowa) 15

Aschenbrenner v. *U. S. F. & G. Co.*, 292 U. S. 80 43

Bernier v. *Pacific Mutual Life Ins. Co.*, 173 La. 1078, 139 So. 629, 88 A. L. R. 765 31

Brady v. *Prudential Ins. Co. of America*, 168 Pa. 645, 32 A. 102 13

Chambers v. *New York Life Ins. Co.*, 148 N. Y. Misc. 561, affirmed 240 N. Y. App. Div. 1027 ..... 18, 51

Cohen v. *Metropolitan Life Ins. Co.*, 112 Pa. Super. 314, 171 A. 106 13

Conn. Gen. Life Ins. Co. v. *Brandstein*, 233 N. Y. App. Div. 723 ..... 18, 51

Conn. Mut. Life Ins. Co. v. *Hirsch*, 266 N. Y. Supp. 950 18, 51

Dakota Life Ins. Co. v. *Midland Nat. Bank*, 18 F. (2d) 903; (C. C. A. 8th Cir.) 15

Equitable Life Assur. Soc. v. *Clements*, 140 U. S. 226 38

Feierman v. *Eureka Life Ins. Co.*, 279 Pa. 507, 124 A. 171 ..... 13, 45

Gorski v. *Met. Life Ins. Co.*, 88 Pa. Super. 326 13

Great Western Life Ins. Co. v. *Snavely*, 206 Fed. (C. C. A. 9th Cir.) 20; 46 L. R. A. (N. S.) 1056 15

Greber v. *Equit. Life Assur. Soc.*, 28 P. (2d) 817 ..... 19, 51

Guardian Life Ins. Co. v. *Katz*, 243 N. Y. App. Div. 11, 275 N. Y. Supp. 743 ..... 18, 50

Horwitz, et ux., v. *New York Life Ins. Co.*, 80 F. (2d) 295 17

Hurt v. *New York Life Ins. Co.*, 51 F. (2d) (C. C. A. 10th Cir.) 96, affirmed on rehearing 53 F. (2d) 450, certiorari denied 285 U. S. 541 15

Kaffanges v. *New York Life Ins. Co.*, 59 F. (2d) 475 (C. C. A. 1st) 18, 50

Kiriakides v. *Equit. Life Assur. Soc. of United States*, 177 S. E. 40 (Supreme Court of S. C.) 17

Page

Lawler v. *Home Life Ins. Co.*, 59 Pa. Super. 409 . . . 13, 14
Mayer v. *Prudential Life Insurance Co.*, 184 A. 267, 121 Pa. Super. 475 . . . 8, 13, 14, 45
Metropolitan Life Ins. Co. v. *Conway*, 252 N. Y. 449, 169 N. E. 642 . . . 29
Mutual Life Ins. Co. v. *Christie*, 36 P. (2d) 73 (Wash.)
Mutual Life Ins. Co. v. *Gargolis*, 53 P. (2d) 1017 . . . 17, 32, 33
Mutual Life Ins. Co. v. *Johnson*, 223 U. S. 335 . . . 38, 39
Mutual Life Ins. Co. v. *McConnell*, 20 Pa. D. & C. 250, 19, 48, 51
Mutual Life Ins. Co. v. *Markowitz*, 78 F. (2d) 396, certiorari denied 296 U. S. 625 . . . 2, 5, 16, 32
Mutual Life Ins. Co. v. *Stroehmann* (1st decision) 6 Fed. Supp. 953, D. C. M. D. Pa. May 17, 1934 . . . 18
Mutual Life Ins. Co. v. *Union Trust Co.*, 244 N. Y. App. Div. 764 . . . 19
Ness v. *Mutual Life Ins. Co. of N. Y.*, 70 F. (2d) 59, 2, 5, 16, 31
New York Life Ins. Co. v. *Bullock*, 59 F. (2d) 747, (D. C. S. D. Fla.) . . . 18
New York Life Ins. Co. v. *Davis*, 5 Fed. Supp. 316, (D. C. W. D. Pa. Nov. 25, 1933) . . . 18, 50
New York Life Ins. Co. v. *Gatti* (not yet reported) . . . 49
New York Life Ins. Co. v. *Gresham*, 154 So. 547 . . . 19, 51
New York Life Ins. Co. v. *Kaufman*, 78 F. (2d) 398, (C. C. A. 9), certiorari denied 296 U. S. 626 . . . 17, 41
New York Life Ins. Co. v. *Ruhlin* (not yet reported) 18
New York Life Ins. Co. v. *Thomas, et ux.*, 27 D. & C. Pa. 215 . . . 17, 48
New York Life Ins. Co. v. *Truesdale*, 79 F. (2d) 481 (C. C. A. 4) . . . 17
New York Life Ins. Co. v. *Yerys*, 80 F. (2d) 264 (C. C. A. 4) . . . 17
Northwestern Life Ins. Co. v. *McCue*, 223 U. S. 234 . . . 38
Northwestern Life Ins. Co. v. *Johnson*, 254 U. S. 96 . . . 29, 45
Northwestern Mut. Life Ins. Co. v. *Pickering*, 293 Fed. (C. C. A. 6th Cir.) 496 . . . 15
Paulson v. *Mont. Life Ins. Co.*, 43 Pac. (2d) 971 . . . 19, 51
Penn Mutual Life Ins. Co. v. *Hartle*, 166 Atl. 614, 165 Md. 120, 91 A. L. R. 1466 . . . 19, 50

Page

Penn Mutual Life Ins. Co. v. *Joseph*, 5 Fed. Supp. 1003 D. C. Minn. 4th Div. Fed. 12, 1934 ..... 18, 50
Pyramid Life Ins. Co. v. *Selkirk*, 80 F. (2d) 553, (C. C. A. 5) 19, 33, 49
Roth v. *Mutual Life Ins. Co. of New York*, 239 N. Y. App. Div. 798 18
Scales v. *Jefferson Standard Life Ins. Co.*, 155 Tenn. 412, 295 S. W. 58, 55 A. L. R. 537 50
Scott v. *New England Mutual Life*, 253 N. W. 685 19
Smith v. *Equitable Life Assur. Soc.*, 89 S. W. (2d) 165 ..... 19, 49
Steinberg v. *New York Life Ins. Co.*, 263 N. Y. 45, 188 N. E. 152 ..... 18, 51
Thompson v. *New York Life Ins. Co.*, 9 F. Supp. 248 17
Wilson v. *Equitable Life Ins. Co.*, 262 N. W. 525 17
Wright v. *Phila. Life Ins. Co.*, 25 F. (2d) 514 50

Statutes:

Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925; 43 Stats. 938; 28 U. S. C. A., Sec. 347 2
New York Insurance Law, Sec. 101, subd. 2 36

Miscellaneous:

A. L. R. (American Law Reports) Annotations: 6 A. L. R. 448, 13 A. L. R. 674, 35 A. L. R. 1491, 55 A. L. R. 549, 67 A. L. R. 1364, 83 A. L. R. 394, 88 A. L. R. 773 27
U. S. Law Week, Vol. 4, page 618 2

Texts:

Cooley's Briefs on Insurance (2d Edition):
Vol. 5, page 4501 12
Vol. 5, page 4503 13
Couch Cyclopedia of Insurance Law:
Volume 1, page 402 44
Volume 8, page 6960 12
Vance on Insurance (2d Edition), Hornbrook Series page 821 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE,

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS.

This case comes to this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit which was granted in limited form by this Court on February 1, 1937. The writ is limited to a consideration of whether the incontestable clause of life policy No. 4,-361,192, issued by respondent to Carl F. Stroehmann, precludes a contest of the disability benefits provided for therein on the ground of alleged fraudulent statements in the application for said policy.

I.

Opinions Below.

The first opinion of the District Court refusing petitioners' motion to dismiss the bill is reported in *6 F. Supp. 953.* The second opinion of the district court reversing its first opinion on authority of *Ness* v. *Mutual Life Ins. Co. of N. Y.* 70 F. (2d) 59, and *Mutual Life Ins. Co. of N. Y.* v. *Markowitz,* 78 F. (2d) 396 (certiorari denied 296 U. S. 625), is not yet reported but is found at pages 158-159 of the record. The opinion of the Circuit Court of Appeals reversing this opinion is found at pages 174-179 of the record and is reported in 86 F. (2d) 47.

The relevant portion of the opinion of the Circuit Court of Appeals in the cases of *New York Life Ins. Co.* v. *Gatti* and *New York Life Ins. Co.* v. *Ruhlin,* decided by the Circuit Court of Appeals for the Third Circuit on the same day as the *Stroehmann* case and relied on in the *Stroehmann* case, is not yet reported but is printed in the appendix to the petition for certiorari.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under *Sec. 240 (a) of the Judicial Code,* as amended by the Act of Feb. 13, 1925 (43 Stats. 938; 28 U. S. C. A. Section 347, page 359).

The date of the decree of the Circuit Court of Appeals sought to be reviewed is October 6, 1936 (R. 180).

The petition for writ of certiorari to this Court was docketed to No. 599, October Term, 1936, on December 23, 1936.

On February 1, 1937, this Court granted certiorari, limited to the question of the application and effect of the incontestability clause in Policy No. 4,361,192 (4 U. S. Law Week, page 618).

III.

Statement of the Case.

The case, having been heard on a motion to dismiss (R. 153-157) the amended bill in equity (R. 3-153) filed by Mutual Life Insurance Company of New York, respondent herein, against Carl F. Stroehmann and Lycoming Trust Company, Trustee (R. 152), petitioners herein, in the District Court of the United States for the Middle District of Pennsylvania, all of the facts necessary for consideration of the question to which the certiorari was limited, appear in the amended bill.

For convenience of reference, the Mutual Life Insurance Company of New York will be referred to as "Respondent," Carl F. Stroehmann as "Insured," and Lycoming Trust Company, Trustee (R. 152), as "Beneficiary." To facilitate reference to the opinions of the lower courts, Policy No. 4,361,192, to which the certiorari is limited, will be referred to as "Policy No. 3."

On June 26, 1930, at Norristown, Pennsylvania, insured made written application to respondent for insurance on ordinary life plan with increasing and level disability benefits and with double indemnity benefits. In continuation of and as part of said written application were written declarations made by the insured to respondent's medical examiner.

On June 30, 1930, respondent issued to insured its ordinary life policy No. 4,361,192 (hereinafter referred to as "Policy No. 3") with double indemnity for death by accident and increasing total and permanent disability benefits.

A copy of the application therefor was attached to the policy (Exhibit F, R. 108-118) and by the terms of the policy, was made part thereof (R. 136).

The policy provided for the payment of an annual premium of $1,370.00, of which $40.00 was the premium for the

double indemnity benefit and $288.80 was the premium for the disability benefits (R. 119).

The beneficiary was ultimately changed to Lycoming Trust Company, Trustee (R. 152).

On October 11, 1932, respondent filed its bill in the District Court of the United States for the Middle District of Pennsylvania against insured and the beneficiary, in which it sought, *inter alia,* to cancel the disability benefits contained in Policy No. 3.

The basis on which cancellation was sought was that insured made certain alleged fraudulent misrepresentations with respect to medical attendance and illness in the application for the policy.

Policy No. 3 contained the following provision:

> "INCONTESTABILITY. — Except for non-payment of premiums and except for the restrictions and provisions applying to the double indemnity and disability benefits as provided in sections 1 and 3, respectively, this policy shall be incontestable after one year from its date of issue unless the insured die in such year, in which event it shall be incontestable after two years from its date of issue."

Fraudulent misrepresentations in the application for the policy are not among the restrictions and provisions contained in Sections 1 and 3 of the policy.

The policy having been issued on June 30, 1930, and the insured not having died within a year from its date of issue, the policy became incontestable on June 30, 1931.

Petitioners filed a motion to dismiss the bill because it set forth no cause of action. In support thereof, petitioners urged that as the bill was not filed until October 11, 1932, more than one year and three months after the expiration of the contestable period, and as the bill did not contest the policy on the ground of non-payment of premiums, nor by reason of any restriction or provision contained in Sec. 1 or Sec. 3 of the policy, insurer was precluded from the

contest set forth in the bill of complaint. In other words, the contest sought to be made by the bill of complaint was on the ground of alleged misrepresentations in the application for the policy and such contest was not within the exceptions from the operation of the incontestable clause.

On May 17, 1934, the District Court, in an opinion written by Hon. Albert W. Watson (R. 160-168, reported in 6 F. Supp. 953), denied the motion to dismiss and directed petitioners to answer on the merits.

The District Court held, that, notwithstanding the expiration of the contestable period, respondent was not limited to a contest of liability for disability or double indemnity benefits on the ground of the restrictions and provisions of Sections 1 and 3 of the policy, but could contest such liability on any ground, including fraudulent representations in the application for the policy.

On July 9, 1934, petitioners filed their answer on the merits.

On April 18, 1935, respondent, having been granted leave to amend its bill so as to include additional misrepresentations alleged to have been discovered since the filing of the original bill, filed its amended bill (R. 3-152).

On May 16, 1935, petitioners renewed their motion to dismiss. In support thereof, they urged that, subsequent to the court's previous opinion, the United States Circuit Courts of Appeals for the Fourth and Ninth Circuits in the cases of *Mutual Life Ins. Co. of N. Y.* v. *Markowitz, et al.*, 78 F. (2d) 396, certiorari denied 296 U. S. 625, and *Ness* v. *Mutual Life Ins. Co. of N. Y.*, 70 F. (2d) 59, had held that policies containing incontestable clauses, identical with that in the case at bar, precluded a contest, after the expiration of the contestable period, of the disability benefits on the ground of fraudulent misrepresentations in the application for the policy.

On July 2, 1935, the District Court, on authority of the *Ness* and *Markowitz* cases (*supra*), reversed its former

opinion and dismissed the amended bill without leave to amend (opinion not reported; will be found at R. 158).

On September 6, 1935, respondent appealed, from the order dismissing the bill, to the Circuit Court of Appeals for the Third Circuit.

On September 6, 1936, the Circuit Court reversed the order of the District Court dismissing the bill and remanded the case for further proceedings (R. 174-179; opinion reported 86 F. (2d) 47).

The Circuit Court declined to follow the *Ness* and *Markowitz* cases (*supra*). In its opinion it referred to the case of *Gatti* v. *N. Y. Life Insurance Co.*, decided the same day, and held that the incontestable clause permitted a contest of the disability benefits on any ground and was not limited to the restrictions and provisions of Sections 1 and 3 of the policy. (The opinion in the *Gatti* case is not yet reported, but is printed at pages 30-34 of the petition for certiorari in this case).

On December 23, 1936, your petitioners filed in this Court, their petition for a writ of certiorari and on February 1, 1937, this Court granted the writ, limiting it to the question of the application and the effect of the incontestability clause in Policy No. 4,361,192 (Policy No. 3).

It is this limited question which is now before this Court.

IV.

Question Presented.

Whether an insurer may contest, after the expiration of the contestable period, the validity of the disability provisions of a life insurance policy on the ground of alleged fraudulent misrepresentations in the application for the policy, where the incontestable clause contained in the policy provides,—

> "* * * except for the restrictions and provisions applying to the double indemnity and disability bene-

fits as provided in sections 1 and 3 respectively, this policy shall be incontestable * * * ''

and fraudulent misrepresentations in the application is not one of the restrictions and provisions contained in Sections 1 and 3 of the policy?

V.

Specification of Error.

(As Limited by the Grant of the Writ of Certiorari.)

The Circuit Court of Appeals erred in holding (R. 178-179) that the expiration of the period provided for in the incontestable clause in Policy No. 3 did not preclude the respondent from contesting the validity of the disability benefit provisions contained therein on the ground of fraud in the procurement thereof.

VI.

ARGUMENT.

A.

The provision that an insurance policy shall be incontestable after the expiration of a specified period, means, that, thereafter within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken.

Modern forms of life insurance policies contain a clause declaring that the policy shall be incontestable after a specified period.

While it is true that in one sense every resistance by the insurer against the demand of a beneficiary or the insured is a contest, the word ''incontestable'' as used in such policies is not used in such sense.

Examination of the authorities reveals that the term ''incontestable'' as used in life insurance policies refers to a

contest directed against the validity of the policy, such as a contest on the ground of fraud in the procurement of the policy. It is not a mandate as to coverage or a definition of the hazards to be borne by insurer.

That such is the proper construction of the term "incontestable," and that such a provision has long been recognized by both the case and statute law of Pennsylvania as a proper provision, is at once apparent from the review of authorities contained in the opinion of the Superior Court of Pennsylvania in the case of *Mayer* v. *Prudential Life Insurance Company of America*, 184 A. 267, 121 Pa. Super. 475.

The question before the Superior Court of Pennsylvania was, whether the incontestable clause contained in a life policy, providing for disability benefits for disability occurring after payment of the first premium, precluded a contest on the ground that insured was disabled prior to the payment of the first premium.

The Superior Court held that the question raised was one relating to whether it was a risk assumed by the policy and not to the validity of the policy and hence, the incontestable clause did not apply. In so holding, the court's opinion so clearly sets forth the principles stated above with respect to incontestable clauses that we will quote at length from the opinion.

The court said (at 121 Pa. Super., at 478, 184 A. at 268):

> "An incontestable clause in a policy of life insurance has long been recognized as being a proper provision and enforceable for the benefit of the insured. Brady *v.* Prudential Life Ins. Co., 168 Pa. 645, 32 A. 102; Central Trust Co. *v.* Fidelity M. L. I. Co., 45 Pa. Super. 313; Lawler *v.* Home Life Ins. Co. of America, 59 Pa. Super. 409; Gorski *v.* Metropolitan Life Ins. Co., 88 Pa. Super. 326; Feierman *v.* Eureka Life Ins. Co., 279 Pa. 507, 124 A. 171, 32 A. L. R. 646. The Act of May 17, 1921, P. L. 682, 40 P. S. Sec. 510, prescribing uni-

form policy provisions, provides: 'No policy of life or endowment insurance * * * shall be issued * * * unless it contains, in substance, the following provisions: * * * (c) A provision that the policy shall be incontestible after it has been in force, during the lifetime of the insured, two years from its date of issue, except for non-payment of premiums, and for engaging in military or naval service in time of war without the consent in writing of an executive officer of the company', which provision was amended by the Act of July 15, 1935, P. L. 1020 (40 P. S. Sec. 510), by adding thereto, 'and that, at the option of the company, provisions relative to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident, may also be excepted.' As the policy was issued and suit was instituted prior to the adoption of the amendment, we need not discuss its meaning on the present appeal. *The real purpose of an incontestable clause is to prevent any defense which may be raised by the insurance company against the validity of the policy, such as fraud, misrepresentation, and condition of health arising in connection with the issuance of the policy;* but as to such provisions and conditions as necessarily must relate to matters which arise after the issuance of a policy and which do not affect the validity of the policy itself, the incontestable clause has not been applied. In Brady *v.* Prudential Ins. Co., *supra*, 168 Pa. 645, at page 650, 32 A. 102, 103, in an opinion by Justice Williams, the court said: 'The provision in the ninth clause (the incontestable clause), which was relied upon to show that the policy was incontestable, did not amount to a confession of judgment. It did not deny to the company the right to defend against an action brought upon the policy, except in so far as the defense might rest on a denial of the validity of the policy itself. All other lines of defense remained open to it.' In Hall *v.* Mutual Reserve Life Ass'n, 19 Pa. Super. 31; Collins *v.* Metropolitan Life Ins. Co., 27 Pa. Super. 353; Sargeant *v.* National Insurance Co., 189 Pa. 341, 41 A. 351; Doll *v.* Prudential

Ins. Co., 21 Pa. Super. 434; McCreighton *v.* American Catholic Union, 71 Pa. Super. 332; Ludwinsha *v.* John Hancock Mutual Life Ins. Co., 317 Pa. 577, 178 A. 28, 98 A. L. R. 705; Robinson *v.* Metropolitan Life Ins. Co., 69 Pa. Super. 274; Starck *v.* Union C. L. Ins. Co., 134 Pa. 45, 19 A. 703, 7 L. R. A. 576, 19 Am. St. Rep. 674, it was held that the incontestable clause does not apply to risks not assumed by the policy. (Italics ours.)

* * * * * * *

"There is a clear distinction between contesting the validity of the policy and denying liability for the reason that disability had not occurred during the period covered by the policy and, therefore, a risk which was never assumed."

* * * * * * *

"This distinction is clearly set forth by Chief Justice Cardozo of the New York Court of Appeals—now Justice of the Supreme Court of the United States—in Metropolitan Life Ins. Co. *v.* Conway, 252 N. Y. 449, 169 N. E. 642:

" 'The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken. Like questions have arisen in other jurisdictions and in other courts of this state. There has been general concurrence with reference to the answer. Sanders *v.* Jefferson Standard L. Ins. Co. (C. C. A.), 10 F. (2d) 143; Flannagan *v.* Provident L. & A. Ins. Co. (C. C. A.), 22 F. (2d) 136; Wright *v.* Philadelphia L. Ins. Co. (D. C)., 25 F. (2d) 514; Scarborough *v.* American Nat. Ins. Co., 171 N. C. 353, 88 S. E. 482, L. R. A. 1918A, 896, Ann. Cas. 1917D, 1181; Myers *v.* Liberty L. Ins. Co., 124 Kan. 191, 257 P. 933, 55 A. L. R. 542; Childress *v.* Fraternal Union of America, 113 Tenn. 252, 82 S. W.

832, 3 Ann. Cas. 236; Brady *v.* Prudential Ins. Co., 168 Pa. 645, 32 A. 102; Illinois Bankers' L. Ass'n *v.* Byassee, 169 Ark. 231, 275 S. W. 519, 41 A. L. R. 379; Woodbery *v.* New York Life Ins. Co., 129 Misc. 365, 221 N. Y. S. 357; *Id.*, 223 App. Div. 272, 227 N. Y. S. 699.

* * *

" 'A provision for incontestability does not have the effect of converting a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen.' (Sanders *v.* Jefferson Standard L. Ins. Co. (C. C. A.), 10 F. (2d) 143, 144 citing and distinguishing Northwestern Life Ins. Co. *v.* Johnson, *supra*, 254 U. S. 96, 41 S. Ct. 47, 65 L. Ed. 155). Where there has been no assumption of the risk, there can be no liability. Hearin *v.* Standard L. Ins. Co. (D. C.) 8 F. (2d) 202; Mack *v.* Connecticut Gen. L. Ins. Co. (C. C. A.) 12 F. (2d) 416; Flannagan *v.* Provident L. & A. Ins. Co. (C. C. A.) 22 F. (2d) 136; Wright *v.* Philadelphia L. Ins. Co. (D. C.) 25 F. (2d) 514; Myers *v.* Liberty L. Ins. Co., *supra;* Draper *v.* Oswego County Fire Relief Ass'n, 190 N. Y. 12, 18, 82 N. E. 755. The kind of insurance one has at the beginning, that, but no more, one retains until the end.' "

From this extract it is clear that both Pennsylvania case and statute law have long recognized and enforced incontestable clauses and that the term "incontestable" as used in life insurance policies refers to a contest directed against the validity of the policy.

B.

The defense of fraudulent representations in the application for a policy is a defense based on the validity of the policy at inception and hence, unless excepted from the operation of the incontestable clause, is precluded thereby.

As we have seen, the incontestable clause in a policy precludes any defense on the policy which is directed to its invalidity at inception. Accordingly, we should expect

that the defense of fraudulent representations in the application, a defense directed to the invalidity of the policy, should be precluded after the expiration of the contestable period. That this is the law will unquestionably appear from the following authorities.

In *Couch Cyclopedia of Insurance Law*, Vol. 8, page 6960, the law is laid down as follows:

> "* * * It also logically follows that inasmuch as incontestable clauses are not against public policy, and are valid and enforceable, every defense within the terms of, or covered by, such clauses, or which is not excepted therefrom, is precluded if not taken advantage of before the clause becomes operative in favor of insured, and this, by the weight of authority, includes the defense of fraud or false statements or warranties in the application for insurance, not for the purpose of condoning the fraud, but as fixing a time beyond which it may not be set up or established; * * *"

In *Cooley's Briefs on Insurance* (Second Edition), Vol. 5, page 4501, it is said:

> "It is obvious that, as a general rule, a policy containing a clause declaring that it shall be incontestable after a specified time cannot be contested after that time on any ground not excepted therein."
>
> * * * * * * *
>
> "When the incontestable clause first appeared in policies, it was strenuously contended that the clause did not prevent the insurer from relying on fraud in the procurement of a policy as a defense to an action thereon. But in the leading case of Wright *v.* Benefit Life Ass'n, 118 N. Y. 237, 23 N. E. 186, 16 Am. St. Rep. 749, 6 L.R.A. 731 (affirming 43 Hun, 61), the New York Court of Appeals squarely held that a provision making a policy incontestable after a certain time from its date embraced the defense of fraud of the insured and the beneficiary in obtaining the insurance. The court points out that the stipulation is not a stipula-

> tion absolute to waive all defenses and to condone fraud. On the contrary, it recognizes fraud and other defenses, and merely limits the time within which they may be, but after which they cannot be, established. The stipulation, the court says, is in the nature of, and serves a similar purpose as, statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. As the stipulation no doubt is a strong inducement to a person to take out insurance, the court says: 'While fraud is obnoxious and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid.' ''

At page 4503, of the same text, the following rule is laid down (citing numerous authorities):

> "The rule that a stipulation making the policy incontestable after a specified period from its date includes fraud in the procurement of the policy, provided the time given is reasonable, is well settled."

That the Pennsylvania courts have uniformly held that the defense of fraudulent representations in the application for a policy is precluded at the expiration of the contestable period clearly appears from the following authorities.

Mayer v. *Prudential Life Ins. Co.*, 121 Pa. Super. 475, 184 A. 267;

Lawler v. *Home Life Ins. Co.*, 59 Pa. Super. 409;

Brady v. *Prudential Ins. Co.*, 168 Pa. 645, 32 A. 102;

Feierman v. *Eureka Life Ins. Co.*, 279 Pa. 507, 124 A. 171;

Cohen v. *Metropolitan Life Ins. Co.*, 112 Pa. Super. 314, 171 A. 106;

Gorski v. *Metropolitan Life Ins. Co.*, 88 Pa. Super. 326.

In *Mayer* v. *Prudential Life Ins. Co.*, from which we have quoted at length (pages 8-10 of this brief), the Pennsylvania Superior Court said (at 184 A. 269, 121 Pa. Super. at 479):

> "The real purpose of an incontestable clause is to prevent any defense which may be raised by the insurance company against the validity of the policy, such as fraud, misrepresentation, and condition of health arising in connection with the issuance of the policy; * * *"

In *Lawler* v. *Home Life Ins. Co.*, 59 Pa. Super. 409, the court, speaking through Henderson, J., said (at p. 412):

> "Whatever its effect might be if it related to the date of the execution of the policy the evident intention in fixing a time at a considerable period after the policy went into operation was to give the insurer an opportunity to investigate the honesty of the insured in making his application and his truthfulness and good faith with reference to the statements therein contained. The insurer thus saved to itself an opportunity to inquire whether the contract should be continued or whether by reason of the untruthful representations of the insured, it should be cancelled. The agreement that the contract should be unimpeached after the lapse of a year may be assumed to have been an inducement to the taking out of the policy. To the insured the meaning of the language of the clause would be that if the company failed to discover any fraudulent conduct on the part of the insured within the time limited it would bind itself to make no defense on that account after the period reserved for such investigation. This gave the insured and the beneficiary protection against possible litigation after a long period had elapsed and when evidence on the disputed questions might not be within reach of the person for whose benefit the policy was issued. The provision is not a contract to condone fraud nor against public policy as tending to encourage dishonesty. It has the

effect rather of a statute of limitations affecting the right of the company to introduce a defense. Abundant time is allowed the insurer to make inquiry and discover any misrepresentation bearing on the liability of the company and if within the period named an inquiry is not made or material facts are not developed it is reasonable that the insurer be held to the terms of the contract. The condition was not absolute from the beginning to waive all defenses but an agreement not to defend after a reasonable period fixed in the contract. Such a condition in a policy was held good in Wright *v.* Mut. Ben. Life Assn. of America, 118 N. Y. 237, and in Regan *v.* Union Mut. L. Ins. Co,. 189 Mass. 555. To the same effect is Brady *v.* Prudential Ins. Co., 168 Pa. 645, * * *."

That the Federal courts have followed the same rule clearly appears from the following authorities:

Great Western Life Ins. Co. v. *Snavely,* 206 Fed. (C. C. A. 9th Cir.) 20; 46 L. R. A. (N. S.) 1056;

Arnold v. *Equitable Life Assur. Soc.,* 228 Fed. 157. (Dist. Court S. D. Iowa);

Dakota Life Ins. Co. v. *Midland Nat. Bank,* 18 F. (2d) 903. (C. C. A., 8th Cir.);

Northwestern Mutual Life Ins. Co. v. *Pickering,* 293 Fed. (C. C. A. 6th Cir.) 496;

Hurt v. *New York Life Ins. Co.,* 51 F. (2d) (C. C. A., 10th Cir.) 936; affirmed on rehearing, 53 F. (2d) 450, certiorari denied, 285 U. S. 541.

From these authorities, it is now well settled that unless fraudulent statements in the application for the policy are excepted from the operation of the incontestable clause, a defense based thereon is precluded.

We come, then, to the question of whether the incontestable clause of Policy No. 3 excepted fraudulent statements in the application.

C.

The incontestable clause contained in Policy No. 3 (Policy No. 4,361,192) did not except fraudulent statements in the application for the policy.

The incontestable clause in Policy No. 4,361,192 (referred to herein as Policy No. 3) to which this certiorari is limited, provides (R. 135):

> "Incontestability.—Except for non-payment of premiums and *except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively,* this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue." (Italics ours.)

Petitioners contend that the contestable period having expired and the insurer not seeking to contest the policy on the ground of non-payment of premiums or by reason of any restriction or provision contained in Section 1 or 3 of the policy, but on the ground of fraudulent statements in the application, such contest is precluded. In other words, petitioners contend that since neither Section 1 or 3 contains any restriction or provision respecting fraudulent statements in the application for the policy, the insurer has not excepted out of the operation of the incontestable clause a contest on the ground of alleged fraudulent statements and hence, is precluded from contesting the policy on such ground.

Supporting petitioners' contention are the following authorities:

Ness v. *Mutual Life Ins. Co. of N. Y.*, 70 F. (2d) 59, (C. C. A. 4);

Mutual Life Ins Co. of N. Y. v. *Markowitz et al.*, 78 F. (2d) 396 (C. C. A. 9), certiorari denied 296 U. S. 625;

New York Life Ins. Co. v. *Truesdale,* 79 F. (2d) 481 (C. C. A. 4);

New York Life Ins. Co. v. *Kauffman,* 78 F. (2d) 398 (C. C. A. 9, certiorari denied 296 U. S. 626;

Horwitz v. *et ux.* v. *New York Life Ins. Co.,* 80 F. (2d) 295 (C. C. A. 9);

New York Life Ins. Co. v. *Yerys,* 80 F. (2d) 264 (C. C. A. 4);

Thompson v. *N. Y. Life Ins. Co.,* 9 F. Supp. 248 (Dist. Court of Okla.); affirmed on another ground 78 F. (2d) 946 (C. C. A. 10);

Kiriakides v. *Equitable Life Assur. Soc. of U. S.,* 177 S. E. 40 (Supreme Court of South Carolina);

Mutual Life Ins. Co. of N. Y. v. *Gargolis,* 53 P. (2d) 1017, decided by Dist. Court of Appeals, 3rd Dist. of California on Jan. 22, 1936;

Wilson v. *Equitable Life Ins. Co.,* 262 N. W. 525 (Supreme Court of Iowa);

New York Life Ins. Co. v. *Thomas et ux.,* 27 Dist. & County Reports (Penna.) 215—decision of Court of Common Pleas of Luzerne County, Penna.;

Stroehmann v. *Mutual Life Ins. Co. of N. Y.*—opinion of Dist. Court in the case at bar reversing, on authority of the *Ness* and *Markowitz* cases (*supra*), its former opinion (opinion not yet reported officially—R. 158-159).

The *Ness, Markowitz* and *Gargolis* cases (*supra*), were all cases involving policies issued by the respondent and containing incontestable clauses identical with that in the case at bar.

The contention of respondent, adopted by the District Court in its first opinion (R. 160-168, 6 F. Supp. 953) and the Circuit Court of Appeals (R. 174-179, 86 F. (2d) 47), is that, notwithstanding the expiration of the contestable

period, insurer is not limited to a contest of liability for disability or double indemnity benefits on the ground of the restrictions and provisions of Sections 1 and 3 of the policy but may contest such liability on any ground, including fraudulent representations in the application for the policy.

In support of this contention, respondent relied, in the court below, on the following cases, all of which were decided prior to the *Ness* and *Markowitz* cases and all of which, with the exception of the *McConnell* case, involved an incontestable clause differing from the phraseology of that involved in the case at bar:

Kaffanges v. *New York Life Ins. Co.*, 59 F. (2d) 475 (C. C. A. 1st);

New York Life Insurance Co. v. *Bullock*, 59 F. (2d) 747 (D. C. S. D. Fla.);

New York Life Insurance Co. v. *Davis*, 5 Fed. Supp. 316, 319, D. C. W. D. Pa. Nov. 25, 1933;

New York Life Insurance Co. v. *Ruhlin*, D. C. W. D. Pa. April 13, 1935, not yet reported;

Mutual Life Ins. Co. of N. Y. v. *Stroehmann* (first decision) 6 Fed. Supp. 953, D. C. M. D. Pa. May 17, 1934;

Penn Mutual Life Ins. Co. v. *Joseph*, 5 Fed. Supp. 1003, D. C. Minn. 4th Div. Feb. 12, 1934;

Connecticut General Life Ins. Co., v. *Brandstein*, 233 N. Y. App. Div. 723;

Roth v. *Mutual Life Ins. Co. of N. Y.*, 239 N. Y. App. Div. 798;

Steinberg v. *N. Y. Life Ins. Co.*, 263 N. Y. 45, 47, 188 N. E. 152;

Chambers v. *New York Life Ins. Co.*, 148 N. Y. Misc. 561, affd. 240 N. Y. App. Div. 1027, without opinion;

Guardian Life Ins. Co. v. *Katz*, 243 N. Y. App. Div. 11, 275 N. Y. Supp. 743;

Connecticut Mutual Life Ins. Co. v. *Hirsch*, 266 N. Y. Supp. 950;

Mutual Life Ins. Co. of N. Y. v. *Union Trust Co.*, 244 N. Y. App. Div. 764;

Penn Mutual Life Ins. Co. v. *Hartle*, 166 Atl. 614 (Md.);

Mutual Life Insurance Co. of N. Y. v. *McConnell*, 20 Pa. Dist. & Co., 250 (Common Pleas Mercer Co.);

Greber v. *Equitable Life Assur. Soc.*, 28 Pac. (2d) 817 (Ariz.);

Scott v. *New England Mutual Life*, 253 N. W. 685, (Neb.); on rehearing 256 N. W. 910, which report states in substance the incontestable clause;

New York Life Ins. Co. v. *Gresham*, 154 So. 547 (Miss.);

Paulson v. *Montana Life Ins. Co.*, 43 Pac. (2d) 971 (Wash.).

The following cases have been decided since the *Ness* and *Markowitz* cases and each of these cases recognizes that the incontestable clause in those cases (and the case at bar) is more limited, and, that the limitation is a distinguishing factor.

Pyramid Life Ins. Co. v. *Selkirk*, 80 F. (2d) 553 (C. C. A. 5);

Smith v. *Equitable Life Assur. Soc.*, 89 S. W. (2d) 165 (Supreme Court of Tennessee).

Before considering the authorities referred to, let us first consider the question presented from the standpoint of the applicable principles involved.

Let us start with those general principles to which, it was apparent from the argument in the court below, petitioners and respondent agree. These principles, the authorities for which we have set forth (pages 7-15 of this brief), are:

1. The incontestable clause in an insurance policy, when properly applied, has no application to defenses going to the coverage of, or risk assumed by, the policy,

but applies solely to defenses going to the validity of the policy.

2. The defense of fraudulent statements in an application for a policy is a defense going to the validity of the policy and hence, subject to the operation of the incontestable clause.

It was further apparent from the argument in the court below that petitioners and respondent agree that,—

1. Where a life insurance policy provides for life, double indemnity and disability benefits, the incontestable clause, contained therein, precludes any contest going to the validity of such policy, whether claim is made under the life, double indemnity or disability features, unless proper exception from the operation of the incontestable clause is made.

2. That, by appropriate language, there may be excepted, from the operation of the incontestable clause, defenses going to the validity of the policy when claims are made under the double indemnity or disability benefits contained in a life policy.

Where, then, does the dispute arise? The dispute is whether respondent, applying the principles set forth above, did use appropriate language in the incontestable clause of its life policy, with disability and double indemnity benefits, which it issued to insured, to except therefrom all claims arising under the disability or double indemnity features. As we have seen, the language used by respondent, which it insists has such effect, is:

"Incontestability.—Except for non-payment of premiums and *except for the restrictions and provisions applying to Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively,* this policy shall be incontestable." (Italics ours.)

It is petitioners' contention that such language,—

(a) clearly limits the exception from the incontestable clause to the particular "restrictions and provisions *applying to* Double Indemnity and Disability Benefits as provided in Sections 1 and 3," and that fraudulent statements in the application for the policy, not being among the provisions and restrictions contained in Sections 1 or 3, were not excepted from the operation of the incontestable clause; hence, a defense on such ground is precluded after the expiration of the contestable period.

(b) at most, creates an ambiguity, which, under familiar rules of construction, must be construed most strongly against the insurer, whose language it is.

Respondent contends that such language,—

(a) does not limit the exception to the particular provisions and restrictions of Sections 1 and 3 but excepts *the obligation to pay* disability and double indemnity benefits and permits the making of any defense to a claim for such benefits, including the defense of fraudulent statements in the application;

(b) even if ambiguous, it was placed in the policy pursuant to a provision of the Insurance Statute in the State of New York and the legislative history of such provision should be considered in its interpretation.

Before turning to the particular provisions and restrictions in Sections 1 and 3 of the policy, we want to point out what we think are two very significant things:

1. The first significant thing is that the obligation to pay the Disability and Double Indemnity Benefits is found on page 1 of the policy and not in Sections 1 and 3 of the policy. Sections 1 and 3 of the policy limit the obligation to pay the Disability and Double Indemnity Benefits provided for

on page 1 of the policy. *If, as respondent contends, it intended to except from the operation of the incontestable clause the liability to pay Disability and Double Indemnity Benefits, they could very readily have said, "Except for the Disability and Double Indemnity Benefits as provided on page 1 of this policy."* This is at once apparent from an examination of page 1 of the policy (R. 119), the essential portions of which are as follows:

The policy provides on page 1 (R. 119):

THE
MUTUAL LIFE
INSURANCE COMPANY
OF NEW YORK

WILL PAY

to * * * * Beneficiary

Death Benefit — FORTY THOUSAND Dollars

upon receipt of due proof of the death of CARL F. STROEHMANN, the Insured,

OR

Double Indemnity — EIGHTY THOUSAND Dollars

upon receipt of due proof that such death resulted from bodily injury effected solely through external, violent, and accidental means, and occurred within ninety days after such injury, all upon the conditions set forth in Section I,

AND

if the Insured is totally and presumably permanently disabled before age 60,

WILL PAY

Disability Benefits (a) Income and (b) Waiver of Premium Indemnity — to the Insured FOUR HUNDRED Dollars monthly during such disability, increasing after five and ten years continuous disability, besides waiving premium payments, all upon the conditions set forth in Section 3.

As the policy is printed in the Record at page 119, it does not show in the margin the marginal notations which we have indicated above and which are found in the original policy. If this Court deems this divergence, from the original record, of sufficient importance to require that the original record be produced in Court, petitioners will ask for authority to have the original record sent up.

From the above, we submit that it is apparent that the obligation to pay the Disability and Double Indemnity Benefits is set forth on page 1 of the policy and not under Sections 1 and 3 of the policy. As we will see from an examination of these sections, they limit the obligation to pay these benefits as set forth on page 1 of the policy.

2. The second significant thing is that the language used by the respondent, to create an exception from the incontestable clause, refers to "the provisions and restrictions *applying to* the Disability and Double Indemnity Benefits as provided in Sections 1 and 3." We submit that the word "provisions" is used here in the sense of the provisions which *apply to* and not provisions which *create* the Disability and Double Indemnity Benefits.

This distinction is all the more apparent when we examine the policy and find that the restrictions and provisions which are set forth in Sections 1 and 3 are the provisions and restrictions which *apply to* the Double Indemnity and Disability Benefits, but which do not apply to the life benefits. Let us turn, then, to Sections 1 and 3 of the policy and see what these provisions and restrictions are. In this connection, we will set forth only those provisions and restrictions of Sections 1 and 3 of the policy to which the incontestable clause has been held to apply.

Section 1 of the policy reads (R. 121):

> "The Double Indemnity will be payable upon receipt of due proof that * * *; *provided* that the Double

Indemnity shall not be payable if death resulted from self-destruction, whether sane or insane, or from military or naval service in time of war, or from any act incident to war, or from engaging in riot or insurrection, or from committing an assault or felony, or from participation in aeronautics, or directly or indirectly from disease or bodily or mental infirmity." (Italics ours.)

Section 3 of the policy reads (R. 124):

"SECTION 3. Benefits in Event of Total and Permanent Disability before Age 60.

. . . . . .

"General *Provisions*

. . . . . .

"Disability Benefits shall not be granted if disability is the result of self-inflicted injury.

"The provision for Disability Benefits shall automatically terminate if the Insured shall at any time, voluntarily or involuntarily, engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada." (Italics ours.)

We submit that the use of the word "*provided*" in Section 1 and the use of "*General Provisions*" in Section 3 supports our contention. The "provisions" referred to in the exception contained in the incontestable clause are those which under the double indemnity clause in Section 1 follow the word "provided," to-wit: double indemnity shall not be payable if death results from

(a) self-destruction whether sane or insane,
(b) military or naval service in time of war,
(c) any act incident to war,
(d) engaging in riot or insurrection,
(e) committing an assault or felony,
(f) participation in aeronautics.

The "provisions" referred to in the exception contained in the incontestable clause are likewise those contained in Section 3, which are found under the title *"General Provisions"* and among these are the following:

(a) that disability benefits shall not be granted if the disability is the result of self-inflicted injury.

(b) that disability benefits shall terminate if insured shall voluntarily or involuntarily engage in military or naval service.

Examination of the policy shows that none of the provisions set forth in either Section 1 or 3 *apply* to the life benefits. The policy contains no provisions or restrictions applying to the life benefits respecting military or naval service, engaging in riot or insurrection, committing an assault or felony or participating in aeronautics. This, we submit, is eloquent evidence of the fact that when respondent excepted "the provisions and restrictions *applying* to Double Indemnity and Disability Benefits as provided in Sections 1 and 3," it intended to except the particular provisions and restrictions of Sections 1 and 3 and did not intend to except the obligation to pay the benefits which is set forth on page 1 of the policy.

In this connection, it should be noted that both Sections 1 and 3 provide that the double indemnity and disability benefits *shall not be paid* if death results from self-destruction while sane or insane.

Section 14 of the policy reads (R. 134):

"Section 14. Miscellaneous Provisions.

* * * * * * *

"Suicide.—In the event of the self-destruction of the Insured, whether sane or insane, within one year after the date of issue of this Policy, the amount payable shall be limited to an amount equal to the premiums paid hereon."

Thus, with respect to double indemnity and disability benefits, self-destruction while sane or insane, no matter how long after the inception of the policy, will not create an obligation on the respondent. On the contrary, with respect to life benefits, no restriction is placed on self-destruction, whether sane or insane, if such self-destruction occurs more than a year after the issuance of the policy.

We submit, that, when the respondent excepted, from the incontestable clause, "the restrictions and provisions *applying to* double indemnity and disability benefits as provided in Section 1 and 3," it wanted to preserve its right to contest the policy on the ground that the claim resulted from (a) an act of self-destruction while sane or insane, (b) engaging in military or naval service, (c) commission of an illegal act or (d) participation in aeronautics. All of these defenses are defenses which arise out of "the restrictions and provisions *applying to* double indemnity and disability benefits" and are "provided in Sections 1 and 3."

But, says respondent, this construction makes the language of the exception a nullity for all of these provisions are matters of coverage or risk and not subject to the operation of the incontestable clause which operates only upon defenses going to the validity of the policy.

As we have pointed out, we agree that such is the effect of the incontestable clause when *properly* applied. The difficulty is that all courts have not recognized this distinction and all courts have not agreed on what is a matter of coverage or risk and what is a matter of validity. The matters on which they have differed are these very provisions, to-wit: suicide while sane or insane; death while in (a) military or naval service, (b) committing an illegal act, (c) participating in aeronautics, and self-infliction of disability.

That there is a conflict of the authorities on the effect of the incontestable clause on—

(a) suicide clauses—see annotations in 55 A. L. R. 549, 67 A. L. R. 1364;

(b) conditions against liability for injury while engaged in aeronautics, see annotations in 83 A. L. R. 394;

(c) an express exception in the incontestable clause as negativing other exceptions thereto, see annotation in 88 A. L. R. 773;

(d) excluding defenses based on public policy, see annotations in 6 A. L. R. 448; 13 A. L. R. 674; 35 A. L. R. 1491.

In *Vance on Insurance* (2nd Edition), Hornbook Series, page 821, Professor William R. Vance, of Yale University Law School, very clearly points out that there does exist, in the cases, considerable conflict with respect to the operation of the incontestable clause. At page 821, Professor Vance says (citing many authorities for the propositions set forth):

> "If the defense which the insurer seeks to set up is reserved to the insurer by the terms of the incontestable clause itself, obviously the clause will not bar the insurer's right to avail himself of this defense. In many cases the clause itself provides that it shall not be applicable to such defenses as fraud, or suicide. But difficulty comes with those cases where an attempt is made in the policy to exclude the risk, but not in the incontestable clause. The question whether the incontestable clause overrides the attempted exclusion in the policy has been made to depend on whether the exclusion was by a technical exception, or merely by a condition, the breach of which would enable the insurer to terminate his liability. The incontestable clause should be construed merely as an agreement on the part of the insurer not to contest the validity of the policy as written. On principle, it should not operate to prevent the defense of an action, even after the expiration of the contestable period, on the ground that the loss was not covered because excepted under the

terms of the policy. This distinction between risks expressly excepted from the coverage of the policy, and mere conditions in the policy giving to the insurer the power of terminating his liability thereon, has been recognized in several jurisdictions. Thus where the policy expressly excepted the risk of death by suicide within one year, the insurer need not make a contest within the designated contest period in order to defend on the ground that the insured took his own life within the year. However, many courts have failed to distinguish between such excepted risks, and mere conditions in the policy, holding that in either event such defense is barred to the insurer unless asserted within the contest period. Thus even though the policy provided that 'self-destruction, sane or insane, within one year from the date of this policy is a risk not assumed by the company under this policy,' it has been held that the privilege of defending after the time limit for contest, on the ground that the insured committed suicide within the year, was barred.

"It seems to be uniformly held that where the defense sought to be raised is a mere condition, not contained in the incontestable clause, it will be barred if not asserted within the contestable period. Thus where the policy provides that it will be avoided if the insured commits suicide within a year, the insurer must institute his contest within the time fixed by the incontestable clause. Likewise the incontestable clause has been held to preclude the insurer from showing in defense that the insured came to his death in consequence of a violation of the law, contrary to a policy condition; or by execution for crime."

Accordingly, it is apparent, that, while on principle, the incontestable clause should not operate to preclude a contest on the ground that the loss which occurred was not covered because it was excepted under the terms of the policy, nevertheless there is quite a conflict among the decisions as to whether or not a risk is an excepted risk or a

condition and whether it is subject to the operation of the incontestable clause.

Since this conflict of decisions exists, we need not assume that it was an excess of caution which moved the respondent to except suicide, military or naval service, participation in aeronautics, and other provisions of Sections 1 and 3 of the policy, from the incontestable clause. Protection against this conflict is, we submit, a reasonable interpretation of the clause and one in accord with the plain meaning of the language employed.

Not only is it a reasonable inference that respondent wanted to protect itself against this conflict of decisions, on the question of whether the incontestable clause applied to exceptions from the risk, but it is also a reasonable inference that respondent wanted to protect itself against the application of the incontestable clause, should the provisions of Sections 1 and 3 be construed to create conditions subsequent.

While the incontestable clause does not properly apply to matters of coverage, it does apply to conditions subsequent which relate to the validity of the policy.

It may be that, in the light of the fact that Sections 1 and 3 of the policy provide that no benefits shall be paid in the event of self-destruction, engaging in war, etc., and do not provide that the premiums paid shall be returned in such event, the provisions of Sections 1 and 3 would be construed to create a condition subsequent which is subject to the incontestable clause.

That, it has been held, that a provision in a policy forfeiting the premiums paid, is subject to the incontestable clause, see *Northwestern Mutual Life Ins. Co.* v. *Johnson*, 254 U. S. 96.

In his opinion in the case of *Metropolitan Life Insurance Company* v. *Conway, Supt. of Ins.*, 252 N. Y. 449, 169 N. E. 642, Mr. Justice Cardozo—then Chief Justice of the Court

of Appeals of New York—points out that the *Johnson* case is not in conflict with the rule that the incontestable clause does not apply to matters of coverage. He says (252 N. Y. 449, at 453):

> "Northwestern Mutual Life Ins. Co. *v.* Johnson (254 U. S. 96 (1920)) is not a decision to the contrary. The clause there in question was not a limitation as to coverage. It was a provision for a forfeiture. In case of the suicide of the insured, whether sane or insane, the policy was to be 'void.' This meant the forfeiture of the privilege to receive the surrender value of the policy or equivalent benefits, a privilege which would survive if there was merely a limitation of the hazards. Statutes there are indeed whereby the enjoyment of surrender values is preserved against forfeiture by the insurer for breach of a condition as to the payment of premiums (see *e. g.*, N. Y. Ins. Law, Secs. 88, 101, subd. 6), but not against conditions generally. What was said by Holmes, J., of the effect of the 'incontestable clause' must be read in the light of the question before him. It is true, as he says, that with such a clause the death of the insured coupled with the payment of the premiums, will sustain a recovery in the face of a forfeiting condition. It is quite another thing to say that the same facts will prevail against a refusal to assume the risk. Later cases in the Federal courts develop the distinction clearly."

We submit, therefore, that it is a reasonable inference, that respondent desired to protect itself against the possibility of any court holding that the provisions of Sections 1 and 3 of the policy created conditions subsequent and hence, unless specifically excepted from the incontestable clause, subject to its operation.

That there is a conflict in the decisions even as to what is a condition subsequent which is subject to the incontestable clause and what is an excepted risk, is well illustrated by a recent decision.

Thus, in the case of *Bernier v. Pacific Mutual Life Ins. Co.* 173 La. 1078, 139 So. 629, 88 A. L. R. 765, the policy provided that in the event insured's death resulted from aerial navigation (with certain exceptions as to licensed pilots, etc.), "the only liability under this policy shall be for a sum equal to the premiums paid." The policy, likewise, provided that if insured should engage in military or naval service within a specified time, liability under the policy would be limited to dividend additions, etc. The incontestable clause contained therein provided that the policy should be incontestable except for non-payment of premiums or violation of the condition of policy relating to military or naval service. The Louisiana Supreme Court (three judges dissenting) held the *Conway* case did not apply and the provision against aerial navigation was subject to the incontestable clause. The court put its decision largely on the ground that if the aerial navigation clause was one limiting the coverage, so was the one relating to war or naval service, and since the insurer had seen fit to specifically except from the incontestable clause only the war and naval service clause, they must have intended to have it apply to the aerial navigation clause.

We submit the point is, not whether all these conflicting decisions can be reconciled or distinguished, but that they do exist and it is reasonable to suppose that respondent wanted to avoid such conflicting decisions and except out of the operation of the incontestable clause all these provisions relative to naval or war service, suicide, etc., about which the authorities are so conflicting.

In *Ness* v. *Mutual Life Insurance Company of New York*, 70 F. (2d) 59 (C. C. A. 4), the Circuit Court of Appeals for the Fourth Circuit had before it a policy issued by respondent with an identical incontestable clause. In holding that it was limited to the provisions and restrictions con-

tained in Sections 1 and 3 of the policy, the Court said (at page 60):

> "The purpose of the second exception in the incontestability clause was to make clear that, notwithstanding the provisions of that clause, the company reserved the right to rely upon the restrictions and provisions contained in sections 1 and 3. Thus the right was reserved to contest, under section 1, liability for double indemnity in case of suicide or death resulting from military or naval service or from engaging in felony. And the right was reserved to contest, under section 3, claims for disability where due proofs had not been furnished, or where upon request of the company proofs of the continuance of the disability had been refused, or where the disability resulted from self-inflicted injury or from military or naval service beyond the continental limits of the United States and Canada. Under some recent decisions defenses under clauses such as those contained in sections 1 and 3 are held not to be precluded by the incontestability clause. See Scales *v.* Jefferson Standard Life Ins. Co., 155 Tenn. 412, 295 S. W. 58, 55 A. L. R. 537, and note, and Wright *v.* Philadelphia Life Ins. Co. (D. C.) 25 F. (2d) 514, and cases there cited. But in many jurisdictions it is held that the incontestability clause does preclude a defense based upon such provisions. See notes in 55 A. L. R. 549 and 67 A. L. R. 1364. It was evidently to guard against a construction of the policy holding that the defenses reserved in sections 1 and 3 were precluded by the incontestability clause, that the second exception in that clause was inserted."

We have cited (pages 16-17) the opinions of other courts which agree with this analysis.

Since the Ness decision no court, except the court below, has refused to follow it when the exact language of the *Ness* case was involved.

Thus, in *Mutual Life Ins. Co. of N. Y.* v. *Markowitz,* 78 F. (2d) 396 (certiorari denied 296 U. S. 625), and *Mutual*

Life Insurance Company of New York v. *Gargolis*, 53 P. (2d) 1017 (Dist. Court of Appeals of California), the only cases in which an incontestable clause identical to that of the *Ness* case was involved, the *Ness* case was followed.

In the other cases (cited pages 16-17) the principles of the *Ness* case were approved and applied to incontestable clauses which, we submit, were not as restricted as that in the *Ness* case.

The court below relied (R. 179, 86 F. (2d) 49) on its opinion in the case of *New York Life Ins. Co.* v. *Gatti* and *New York Life Ins. Co.* v. *Ruhlin* (decided by it on same day—not yet reported because petition for rehearing is pending, but printed as appendix to petition for certiorari in case at bar).

Examination of the *Ruhlin* and *Gatti* cases showed that the court below relied on *Pyramid Life Ins. Co.* v. *Selkirk*, 80 F. (2d) 553 (C. C. A. 5). In neither the *Ruhlin* and *Gatti* cases, nor in the *Selkirk* case, was the language of the incontestable clause in the case at bar involved. And we submit that it is significant that even in the *Selkirk* case the court conceded that the language of the incontestable clause was more restricted in the *Ness* case. The court said, 80 F. (2d) 553, at 554:

> "Ness *v.* Mutual Life Ins. Co. (C. C. A.) 70 F. (2d) 59, 61, strongly relied upon by appellee, is inapposite to the determinative question here presented. The incontestability clause there considered, unlike this clause, provides that: '* * * Except for the restrictions and provisions applying to the double indemnity and disability benefits *as provided in Secs. 1 and 3*, respectively, this policy shall be incontestable after one year * * *.' (Italics supplied). Thus, as emphasized in the Ness Case, that exception was expressly limited to the restrictions and provisions 'enumerated in the sections to which specific reference was made, i. e. sections 1 and 3,' of that policy, which in general

> correspond to the rider here under consideration. It is as if the clause here under consideration had been written, '* * * Except as to provisions and conditions relating to disability benefits as provided in the rider attached to this policy, * * *' which is the construction contended for by appellee, in which he prevailed below. But no such restrictive language here appears. Its absence clearly distinguishes this case from the Ness Case, as the exception considered in the latter is much more limited than that here involved."

We submit that irrespective of the construction of the incontestable clause in the *Ruhlin* and *Gatti* cases, there is a distinction from those cases arising out of the language of the incontestable clause in the *Ness* case and it should have been recognized by the court below.

If, as respondent contends, it intended to except from the operation of the incontestable clause all claims under the disability and double indemnity benefits, there are any number of ways in which this could have been clearly expressed.

We have seen that the obligation to pay the double indemnity and disability benefits is found on page 1 of the policy. Respondent could have said:

> "Except for the Double Indemnity and Disability Benefits as provided on page 1 of the policy."

Or respondent could have said:

> "Except for non-payment of premiums and except as to all claims for double indemnity and disability benefits, this policy shall be incontestable after one year from its date of issue. * * *"

Or if it intended to have its incontestable clause apply to double indemnity and disability benefits, but to reserve the right to contest such claims on the ground of fraud, it would have written a clause substantially as follows:

> "Except for non-payment of premiums and except as to fraud in procuring double indemnity and insurance against disability, this policy shall be incontestable after one year from its date of issue. * * *"

But it did neither. It did not exclude all claims for double indemnity and disability, and it did not except fraud as a defense. It declared that—

> "Except for non-payment of premiums and *except for the restrictions and provisions applying to Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively,* this policy shall be incontestable after one year from its date of issue. * * *"

What is excepted by this clause is not the obligation to pay double indemnity or disability benefits, but only those restrictions and provisions relating thereto which appear in Sections 1 and 3.

These restrictions and provisions, as we have seen, are those relating to suicide, war or naval service, self-inflicted injury, etc., with respect to which the courts are in conflict as to whether they are subject to the incontestable clause and against which conflict insurer was seeking to, or could reasonably be construed to be seeking, to protect itself.

Since this conflict of decisions exists, we need not assume that it was an excess of caution which moved the respondent to except suicide, military or naval service, participation in aeronautics, and other provisions of Sections 1 and 3 from the incontestable clause. Protection against this conflict is we submit a reasonable interpretation of the clause and one in accord with the plain meaning of the language employed.

We submit that the language used by the respondent clearly means that the exception is limited to the particular restrictions and provisions contained in Sections 1 and 3 of the policy and the exception did not cover fraudulent state-

ments in the application for the policy.

Even if the language is regarded as ambiguous, neither a provision of the insurance law of the State of New York, nor the reason for its enactment, should be considered in its interpretation.

D.

Neither a provision of the insurance law of the State of New York, nor the reason for the enactment of the same, is applicable to the interpretation of the incontestable clause contained in Policy No. 3 (Policy No. 4,361,192).

Respondent strenuously urged in the court below that the exception from the incontestability clause was inserted pursuant to express authority of an amendment of Section 101, subdivision 2 of the New York Insurance Law, and that such amendment was made to remove an advantage which accident and health companies had in New York State prior to the enactment of such section and that this should be considered by the court in the interpretation of the incontestable clause.

Prior to 1923, Section 101, subdivision 2 of the New York Insurance Law provided:

> "Sec. 101. S t a n d a r d Provisions. * * * no policy of life or endowment insurance shall be issued or delivered in this state * * * unless it contains *in substance* the following provisions: (Italics ours)
>
> * * * * * * *
>
> "2. A provision that the policy shall be incontestable after two years from its date of issue except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war."

In 1923 this section was amended to read as follows:

> "2. A provision that the policy shall be incontestable * * * except for violation of the conditions of the

policy relating to military or naval service in time of war and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."

Respondent contended, in the court below,—

(1) that prior to the amendment of 1923, a life insurance policy, which contained disability and double indemnity benefits, was required by statute to contain an incontestable clause, which made the entire policy incontestable after the expiration of the contestable period, whether claim was made under the life, double indemnity, or disability benefits;

(2) that accident and health companies, in New York, had an advantage over life insurance companies, in that they were not required to have, in policies issued by them and containing benefits similar to the double indemnity and disability features of a life policy, an incontestable clause;

(3) that it was to remove such disadvantage that the New York Legislature amended the insurance laws in 1923 to permit life companies, at their option, to except from the operation of the incontestable clause, the disability and double indemnity insurance contained in life policies;

(4) that this legislative history should be considered in the interpretation of the incontestable clause in the policy involved in this suit.

We do not understand respondent by this contention to urge that the policy is governed by the law of the State of New York.

Indeed, we do not see how respondent could successfully contend that the policy was governed by New York law.

The Bill of Complaint avers (R. 3) that insured is a resident of Pennsylvania, (R. 6) that insured made application for the policy at Norristown, Pennsylvania, and (R. 7) that the policy was duly delivered to insured. The application (R. 108-109), attached to and made part of the policy, (Exhibit F of the Amended Bill of Complaint), recites that insured is a resident of, and that his place of business is at, Norristown, Pennsylvania. While it is true the bill does not aver specifically that the policy was delivered to insured in Pennsylvania, we submit that from these facts the only inference to be drawn, particularly since there is no averment to the contrary, is that the policy was delivered in Pennsylvania. The application, which by express provision of the policy (R. 136) is made part of the contract, provides (R. 108) *inter alia:*

> "The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; * * *"

The bill, not averring delivery of the policy and payment of the first premium at any place other than the place of the application, it is a reasonable inference that the policy was delivered to insured and the first premium paid at Norristown, Pennsylvania.

The contract of insurance is to be interpreted in accordance with the law of the state where delivery was made.

Mutual Life Ins. Co. of N. Y. v. *Johnson,* 293 U. S. 335;
Northwestern Mutual Life Ins. Co. v. *McCue,* 223 U. S. 234;
Equitable Life Assur. Society v. *Clements,* 140 U. S. 226.

The Supreme Court of Pennsylvania has never passed on the question involved in the case at bar. Accordingly, this

Court must make a choice between the alternative constructions adopted by the Circuit Court of Appeals of the Third Circuit and that of the Circuit Court of Appeals of the Fourth and Ninth Circuits in the *Ness* and *Markowitz* cases. The question is an open one before this Court and the statutes or decisions of the State of New York are not controlling since delivery of the policy was not made there.

Mutual Life Ins. Co. of New York v. *Johnson*, 293 U. S. 335.

As we have stated, we do not understand respondent's contention to be, that the policy in the case at bar is to be governed by the law of the State of New York. We understand respondent's contention to be limited to the position that, in the interpretation of the language used in the incontestable clause, the court should consider, as an aid in its interpretation, the legislative history which, respondent contends, prompted the amendment of the New York Insurance laws.

Our position is, that, where there is no question raised as to whether the policy contained provisions contrary to the law of the state where it was issued or delivered, but, where the question is, what reasonable interpretation can be placed, by the policyholder, on phraseology used in the policy, legislative history cannot be considered in such interpretation. This is particularly true where the legislative history, urged as an aid in the interpretation of the phraseology of the policy, is that of a state other than the state in which the policy was delivered.

We submit that neither this provision of the New York Insurance Law, nor the reason for its enactment, should control the interpretation of the incontestable clause for the following reasons:

1. A most compelling reason, for not regarding the statute as controlling, in the interpretation of the incontestable

clause in Policy No. 3, is that, the language of the policy is not the language of the statute but a very much more involved language. The statute provides an optional exception in the following language:

> "At the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."

The policy exception is in the following language:

> "except for the *restrictions* and *provisions applying to* the Double Indemnity and Disability benefits *as provided in Sections 1 and 3 respectively.*" (Italics ours.)

As is pointed out in the *Ness* and *Kaufman* cases, the company could certainly, with its skilled policy draftsmen, had they intended to except the disability and double indemnity insurance as such, have selected language which clearly said so. On the contrary, they use language pointing to the *restrictions and provisions applying* to the disability benefits as provided in Section 3. The clear inference from this is that the *restrictions* and *provisions*, which are set forth in Sec. 3, are what are excepted from the operation of the clause.

2. The statute provides *an optional exception*, when respondent chose the particular language "except for the *restrictions* and *provisions applying to* the Double Indemnity and Disability benefits *as provided in Sections 1 and 3 respectively*" (Italics ours), we submit, it is a reasonable construction of this language, to say that this particular respondent did not desire the full benefit of the optional exception to the extent of exempting the double indemnity and disability insurance as such. Respondent may have desired to take advantage of the option, only to the extent of protecting itself against the conflicting decisions on

whether the incontestable clause applied to the particular restrictions and provisions of Sections 1 and 3.

3. To have such statute and legislative history control is to require the policyholder, in this case a resident of Pennsylvania, to be familiar with the legislative policy of a foreign state. Unless the language is so clear as to enable the policyholder to recognize the exception made, he should not be charged with an interpretation based on legislative history. The true test, for interpreting the clause, is the interpretation, which the policyholder may reasonably get from the language of the policy.

4. While legislative history is a proper consideration where interpretation of the statute itself is involved, where interpretation of the contract made between two parties is involved the interpretation should be based on the language of the contract. This is particularly true since the statute says "unless it contains *in substance* the following provisions."

5. There is nothing, before this Court, to show that the legislative intent was to remove competition between accident and health companies. This is pointed out by the Circuit Court of Appeals in *New York Life Ins. Co.* v. *Kaufman*, 78 F. (2d) 398 (C. C. A. 9), where the court said (at page 402):

> "Counsel strongly urged, in explanation of such drafting, that the court take judicial notice of a business rivalry between groups of life and accident companies in New York, in the process of which the incontestability clause was redrafted to its present form in aid of its warring solicitors. While the court has judicial knowledge of the New York statutes, it can know nothing, outside the record, of the company's business history as causing such draftsmanship even if it were relevant to its interpretation. Much less can such knowledge be imputed to the ordinary man solicited to take the insurance."

6. So far as we have been able to find, no New York court has considered a policy, in which, the language of the incontestable clause in the case at bar was involved. Nor have we been able to find that any New York court, in its decision, considered the grounds urged by the Circuit Courts of Appeals in the *Ness* and *Markowitz* cases.

7. To petitioners, it seems that the conclusion is irresistible that if the language, used by respondent, is so uncertain as to require resort to legislative history to interpret it, an ambiguity arises, which, in accordance with the principles hereinafter set forth, must be resolved in favor of the insured.

We submit, that petitioners contention, that the effect of the exception from the incontestable clause is to preclude only such contests which pertain to the provisions and restrictions of Sections 1 and 3 of the policy, places a reasonable construction on the incontestable clause and one which a reasonable policy holder not only could, but would, make.

We submit, that respondent's contention, that limiting the application of the incontestable clause to the specific provisions and restrictions of Sections 1 and 3 makes the language a nullity, since respondent always had the right to contest them because they relate to matters of coverage or risk, places an unreasonable construction on the language used. If, as respondent contends, the only purpose of the exception was to preserve to insurer the right to contest the validity of the policy, respondent, with its staff of skilled policy draftsmen, would most certainly have used language which specifically referred to fraud in the inception or contests of validity of the policy. At least it would not have chosen language which called attention to the *provisions and restrictions applying to* disability and double indemnity benefits as provided in Sections 1 and 3.

Certainly the least that can be said is that the language used in creating the exception is not clear, is ambiguous, permits different constructions, and, in accord with the general principle of insurance law, must be construed most strongly in favor of the insured.

E.

The insurer having used, in the creation of the exception from the incontestable clause, language which is uncertain, ambiguous, and requires interpretation because susceptible to two or more different, but sensible or reasonable constructions, that construction which is most favorable to the insured must be adopted.

In *Couch "Cyclopedia of Insurance Law,"* Vol. I, page 390, Sec. 187, it is said (citing many authorities in support thereof):

> "Like provisions for forfeiture, provisos, exceptions or exemptions, and words of limitation in the nature of an exception are strictly construed against their proposers, the insurer, especially if of uncertain import or reasonably susceptible to a double construction."

In *Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80, this Court, speaking through Mr. Justice Stone, said at page 84:

> "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted, Stipcich *v.* Metropolitan Life Ins. Co., 277 U. S. 311, 322; Mutual Life Ins. Co. *v.* Hurni Packing Co., 263 U. S. 167, 174; and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports." (Citing authorities.)

The reasons for this rule of construction are set forth in *Couch Cyclopedia of Insurance Law,* Vol. 1, page 402. Among the reasons assigned are:

1. Policies of insurance are made on printed forms carefully prepared in the light of wide experience by experts employed by the insurer and in the preparation of which the insured has no voice.

2. Insurance policies are drawn by the insurer so as to limit and define their scope; hence, it is only fair that, any language employed in such limitation or definition should be resolved most strongly against the insurer whose language it is and who is aided by skilled experts in selecting its language.

There can be no contention that this rule should not apply in the case at bar because the language used was placed in the contract pursuant to statute. As we have seen (page 40 of this brief), the language of the statute is far different from that of the exception in the policy. Even if it were not, we submit, the true test is, what reasonable interpretation a policy holder may place on the same when reading it.

F.

The interpretation of the incontestable clause urged by petitioners does not condone fraud, nor work a great injustice to life insurance companies.

In the court below, respondent argued:

> "We believe that a grave injustice will be done to life insurance companies and to the policyholders for whom such companies act as trustees were the erroneous and artificial reasoning initiated by the Court in the *Ness* case to be followed by this and other Courts. * * * No reason can be seen why the rule of these cases (cases cited by respondent), and the sound reasoning underlying it should be departed from to support the

> fraudulent claims of a small group of policyholders against the meritorious position of the great number of honest policyholders constituting these mutual companies."

We submit that as set forth in *Mayer* v. *Prudential Ins. Co. of America,* 184 A. 267, 121 Pa. Super. 475 (from which we have quoted at length, pages eight, nine, ten and eleven, this brief), Pennsylvania has, in both its case and statute law, recognized the incontestable clause as a proper provision and one supported by the public policy of the state.

This Court has said in *Northwestern Life Ins. Co.* v. *Johnson,* 254 U. S. 96, at 101:

> "The object of the clause is plain and laudable,—to create an absolute assurance of the benefit as free from any dispute of fact except the fact of death, as soon as it reasonably can be done."

In *Feierman* v. *Eureka Life Insurance Co.,* 279 Pa. 507, the Supreme Court of Pennsylvania, in speaking of the incontestable clause, said at page 509:

> "Its purpose is not to preclude inquiry into the truthfulness or good faith of the statements made in the application, but to fix a time within which such inquiry shall be made. This is unquestionably a matter concerning which the parties may contract, and such contracts have been upheld as reasonable and proper, and not against public policy. The principle involved is thus expressed in Wright *v.* Mutual Benefit Life Association of America, 118 N. Y. 237, 6 L. R. A. 731: 'No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years; and, in the end, and after the payment of premiums, the death of the insured, and the loss of his and the testimony of others, the claimant, instead of receiving the promised insurance, is met by an expensive law suit to determine that the insurance which the deceased has been paying for through many

> years has not, and never had, an existence except in name. *While fraud is obnoxious, and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time establishing the invalidity of the contract of insurance, it should thereafter be treated as valid.'* (Italics ours.) In Murray *v.* State Mutual Life Insurance Co., 22 R. I. 524, 53 L. R. A. 742, it was said that the insertion of such a provision in the policy is virtually saying to the insured, 'We will take two years in which to ascertain whether your representations are false or not, and whether you have been guilty of any fraud in obtaining the policy; and if, within that period, we cannot detect any such falsity or fraud, we will obligate ourselves to make no further inquiry, and make no defense on account of them.' '' See also Lawler *v.* Home Life Insurance Co., 59 Pa. Superior Ct. 409. (Italics ours.)

We should like to point out that, in the application, insured was asked what other life insurance he then had in force, to which he answered (R. 109-110):

> Northwestern, $80,000.; No Disability Benefits.
> Mutual Life, $10,000.;
> Union Central, $50,000.; Disability Benefits on $10,000.
> Provident Mut., $25,000.; Disability Benefits on $25,000.

Accordingly, the insured had in force $165,000. in life insurance and $35,000. in Disability Insurance when he applied for the policy issued by respondent in the sum of $40,000.

When insured has a large amount of life insurance the company makes a thorough investigation before issuing more insurance, particularly a $40,000. policy. During the year, that respondent reserved by its incontestable clause, to investigate fraud in the procurement of the policy, if

one-half of the fraud charged is true, the company certainly would have found something to put it on inquiry before the expiration of the incontestable clause.

It is only when a claim is made under the disability features that the company bestirs itself and grows articulate as to the provisions of the policy.

In this connection, we would like to point out that in its bill the company does not seek to cancel the double indemnity benefits. If respondent is correct in its construction of the incontestable clause, the alleged fraud, in procurement of the policy, goes to the double indemnity features of the policy as well as to the disability features. The respondent, by not seeking to cancel the double indemnity features, invites insured to keep on paying premiums for the double indemnity benefits. The insured, in the construction of this clause, has a right to ask, "Am I going to pay premiums on this double indemnity benefit only to have, after my death, the beneficiary faced with another contest, when the evidence depends on witnesses who may have died or whose memory may have grown dim?"

We submit, that, it is no injustice to the other policyholders to have the construction adopted, which petitioners urge. All such construction does is to say that insured has entered into a contract, which gave the insurer a year to investigate whether there was any fraud in the procurement of the same, and if insurer did not choose to make such investigation, it cannot thereafter complain of anything such investigation would have revealed.

Not only does such construction not work an injustice to the other policyholders, but it saves them from having purchased only a law suit, when they purchased a policy with similar language. We submit there are large numbers of policyholders who may have made incomplete statements without any wilful or deliberate fraud. If the in-

surer sits idly by, making no investigation during the contestable period, and accepts premiums until a claim is presented, not only has insured failed to get the security which he sought, but he has been deprived of an opportunity, to purchase a policy of insurance, which does clearly provide what his rights shall be. Misfortune having descended on him in the form of disability, he is then unable to purchase the protection he could have sought for, if the language of respondent's policy had clearly put him on notice, that it excepted, from the incontestability clause, all claims for disability and double indemnity insurance.

Authorities Relied on by Respondent.

At pages 18 and 19 of this brief, we cited the authorities on which respondent relied in the lower court to support its position. As the language used, in the incontestable clause, in every one of the cases cited, except the case of *Mutual Life Insurance Company* v. *McConnell,* 20 Pa. Dist. & Co. Reports, 250 (Common Pleas Court of Mercer County), is different from that in the case at bar, they are, for the most part, not in point.

The *McConnell* case (*supra*) was decided prior to the *Ness, Markowitz* and *Kauffman* cases. It does not appear, from the opinion, that the considerations on which the *Ness, etc.,* cases rest, were presented to, or considered by, the Mercer County Court. The only other Pennsylvania decision is, that of the Court of Common Pleas in Luzerne County, in the case of *New York Life Insurance Co.* v. *Thomas,* 27 Pa. Dist. & Co. Reports, and this case adopted the holding of the *Ness* case and declined to follow the *McConnell* case.

Since the decision in the *Ness* case, with the exception of the case at bar, no court, where the language of the *Ness* case has been involved, has declined to follow it.

The only cases which our search disclosed, which were decided since the *Ness* case and declined to follow it, were cases where the exception from the incontestable clause was differently worded. They are:

Pyramid Life Ins. Co. v. *Selkirk*, 80 F. (2d) 553 (C. C. A. 5);

Smith v. *Equitable Life Assur. Soc.*, 89 S. W. (2d) 165;

Gatti v. *New York Life Ins. Co.* and *Ruhlin* v. *New York Life Ins. Co.*, both decided by the lower court on the same day as the Stroehmann case and referred to and relied on therein. (Not yet reported—petition for rehearing is pending—the relevant portions are printed as appendix to the petition for certiorari in this case.)

At page 33 of this brief, we have shown, by a quotation from the *Selkirk* case, that even the *Selkirk* case recognized that the language of the incontestable clause in the *Ness* case was very limited. Even if the *Selkirk* case was authority for the *Gatti* and *Ruhlin* cases (where the language of the incontestable clause was different), we submit the court below should not have followed it in the case at bar.

In *Smith* v. *Equitable*, 89 S. W. (2d) 165, the Supreme Court of Tennessee said (at page 168):

> "The language construed in that case" (the *Ness* case) "was not identical with that now under consideration and lent itself more readily to the construction given it, and that case can be distinguished on this ground; and we are inclined to the view that in that case the learned writer of the opinion overlooked the distinction hereinbefore referred to as emphasized by Chief Justice Cardozo between a denial of coverage and a defense of invalidity."

As we have seen (page 32 of this brief), the *Ness* case did not overlook the distinction between coverage and valid-

ity. On the other hand, the court, in the *Ness* case, pointed out specifically, that in the cases of *Scales* v. *Jefferson Standard Life Ins. Co.*, 155 Tenn. 412, 295 S. W. 58, 55 A. L. R. 537 and *Wright* v. *Phila. Life Ins. Co.* (D. C.), 25 F. (2d) 514, this distinction was recognized. The court further pointed out that not all jurisdictions recognized this distinction and that it evidently was to guard against the failure to recognize this distinction that respondent used the language it did. This clearly distinguishes the *Smith* case.

In the *Gatti* and *Ruhlin* cases (appendix to petition for certiorari), the court below relied on the *Smith* case, which, while it may be authority for the language in the incontestable clause in the *Ruhlin* and *Gatti* cases has, as we have pointed out above, no application to the language of the *Ness* case.

The other cases urged by the respondent in the court below may, generally speaking, be divided into two classes:

1. The decision is based on a supplemental and independent agreement governing disability and double indemnity benefits. The cases are:

Penn Mutual Life Ins. Co. v. *Hartle*, 166 Atl. 614 (Md.), 165 Md. 120, 91 A. L. R. 1466;

Penn Mutual Life Ins. Co. v. *Joseph*, 5 F. Supp. 1003;

Guardian Life Ins. Co. v. *Katz*, 275 N. Y. Supp. 743;

Scott v. *New England Mutual*, 256 N. W. 910 (decision was also based on a statute).

2. There is little, if any, discussion of the incontestable clause, or the exceptions thereto, but simply a statement of the conclusions of the court.

New York Life v. *Davis*, 5 Fed. Supp. 316 (D. C. W. D. Pa.);

Kaffanges v. *New York Life Ins. Co.*, 59 F. (2d) 475 (incontestable clause not quoted in opinion);

Chambers v. *New York Life*, 148 N. Y. Misc. 561 (Incontestable clause not quoted in opinion);

Conn. Mutual v. *Hirsch*, 266 N. Y. Supp. 950 (no opinion);

Mutual Life v. *McConnell*, 20 Pa. D. & C. R. 250;

New York Life v. *Gresham*, 154 So. 547;

Conn. General Life Ins. Co. v. *Brandstein*, 233 N. Y. App. Div. 723 (no opinion filed);

Steinberg v. *New York Life Ins. Co.*, 263 N. Y. 45;

Greber v. *Equitable Life*, 28 P. (2d) 817 (interpretation of a statute was involved);

Paulson v. *Montana Life Ins. Co.* (Wash.) 43 P. (2d) 971 (the language of the clause involved does not appear in the opinion, nor does the opinion state that the company's interpretation of the clause was challenged by the insured).

We submit, therefore, that respondent has cited no authorities on the basis of which the *Ness* case should not be followed, nor has respondent cited any authority which appropriately answers the contentions made in this brief.

Conclusions.

We, respectfully, submit:

(1) That the plain and unambiguous language of the exception from the incontestable clause, in the case at bar, limited the insurer to defenses applicable to the particular provisions and restrictions set forth in Sections 1 and 3 of the policy;

(2) That fraudulent statements in the application, not being referred to in Sections 1 or 3 of the policy, were not excepted by the language of the incontestable clause;

(3) That even if the phraseology, of the exception from the incontestable clause, is not clearly limited to the provi-

sions and restrictions contained in Sections 1 and 3 of the policy, the language used by the insurer is ambiguous and susceptible of two reasonable but different constructions;

(4) That under familiar principles relating to construction of ambiguous clauses, particularly those clauses which create exceptions, the construction which is most favorable to the insured must be adopted;

(5) That this construction is, that the defense of fraudulent statements in the application was not excepted from the operation of the incontestable clause;

(6) That these conclusions are supported by both reason and authority.

WHEREFORE, we respectfully submit that this Court should decide that the contestable period, specified in the policy, having expired and the insurer not having excepted, from the operation of this clause, the defense of fraudulent statements in the application, the respondent is thereby precluded from raising such defense and that as to Policy No. 4,361,192, the Amended Bill in Equity does not set forth a cause of action.

GEORGE H. HAFER,
GEO. ROSS HULL,
CARL B. SHELLEY,
Counsel for the Petitioners.

FILE COPY

FILED
JAN 21 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN and LYCOMING TRUST COMPANY, Trustee

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR RESPONDENT

REESE H. HARRIS,
Scranton, Pa.
Attorney for Respondent

FREDERICK L. ALLEN,
31 Nassau Street
New York City
Of Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN and LYCOMING TRUST COMPANY, Trustee

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a Writ of Certiorari in this case.

The petition is based chiefly upon a conflict between the decision of the Court of Appeals of the Third Circuit and prior decisions of the Courts of the Fourth and Ninth Circuits in Ness vs. Mutual Life Insurance Company of New York, 70 F. (2d) 59, and Mutual Life Insurance Company of New York vs. Markowitz, 78 F. (2d) 396 respectfully, on the first question raised by the petitioner.

This conflict was recognized by the Court of the Third Circuit in its decision in this case and also in its decisions in New York Life Insurance Company vs. Gatti and New York Life Insurance Company vs. Ruhlin decided on the same day as this case and not yet reported. The Third Circuit came to a conclusion contrary to that reached in the Fourth Circuit and the Ninth Circuit.

While we believe the conclusion so reached in this case by the Third Circuit is correct and based upon sound reasoning, we admit that it is contrary to that reached in the Fourth and Ninth Circuits and believe that a review of the question by this Court is desirable. For that reason we do not oppose the granting of the Certiorari.

The foregoing applies only to the first question raised by the petitioner with reference to Policy No. 3, page 7 of the petition. As to the other questions involved in the case on Policies Nos. 1 and 2, there is, so far as we know, no conflict between Circuits.

Respectfully Submitted,

REESE H. HARRIS
(Scranton, Pa.)
Attorney for Respondent

FREDERICK L. ALLEN
(34 Nassau St., New York City)
Of Counsel

FILED OCT
OFFICE - SUPREME COURT, U.S.
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 599.

CARL F. STROEHMANN, *et al.*, *Petitioners,*

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR MUTUAL LIFE INSURANCE CO.

The New York Ins. Law § 101 specifically authorized the Mutual Life to except from its compulsory "incontestable" clause, all the provisions of the policy relating to Disability Benefits.

The Mutual Life did so; and it was, therefore, entitled to a decree rescinding and cancelling so much of a life insurance policy as related to Disability Benefits, notwithstanding the expiration of the so-called one-year contestable period.

FREDERICK L. ALLEN
REESE H. HARRIS
WM. MARSHALL BULLITT
Counsel for Mutual Life Ins. Co.

The Evening Post Job Printing Office, Inc., 80 Lafayette St., New York, N. Y.

INDEX

PAGE

Question Involved 1

Relevant Statute 2

Statement of Facts 3–6

(1) Stroehmann's serious ill health for thirty years.. 3–4

(2) Stroehmann's application for insurance; and his false representations regarding his past health and medical history..... 4–5

(3) Issuance of policy; subsequent discovery of fraud. Suit to rescind "Disability Benefits" *only*..... 6

(4) Decisions below; and conflict of C. C. A. (3rd) and (5th) with C. C. A. (4th) and (9th).... 6

Summary of Points Discussed..... 7

FIRST POINT: Insurance Law § 101(2) as amended in 1923, authorized any insurance company to frame its "incontestable" clause so as to enable it to resist a suit for "Disability Benefits" on the ground that the policy had been originally obtained by fraud, no matter how many years may have elapsed since the policy was issued..... 8–13

1. All Courts [State and Federal] hold that under § 101 as amended, an insurance company can frame its "incontestable" clause so as to rescind the Disability Benefit provisions, on the ground that the policy was obtained by false representations, even though the suit is not brought until after the balance of the policy has become incontestable (Authorities cited in the margin, p. 8, *infra*)..... 8–11

PAGE

2. Even before the 1923 Amendment, an insurance company could resist a claim on the ground that it was not within the limits of coverage..... 9–11

Metropolitan Life Ins. Co. v. *Conway*, 252 N. Y. 449.

Smith v. *Equitable Life*, 169 Tenn. 477.

3. By the 1923 Amendment to Insurance Law § 101, the Legislature specifically gave every insurance company the "option" to except Disability Benefits from its "incontestable" clause..... 11–13

SECOND POINT: Mutual Life had the right to rescind and cancel Stroehmann's Disability Benefits (notwithstanding the expiration of the one-year contestable period), because—under the statutory option granted by § 101—Mutual Life had excepted Disability Benefits from the "incontestable" clause 13–29

1. Typical forms of "incontestable" clauses exempting Disability Benefits therefrom—all with equivalent legal effect..... 14

Mutual Life v. *Strochmann*, 86 F. (2d) 47. 14

New York Life v. *Yerys*, 80 F. (2d) 264. 14

New York Life v. *Kaufman*, 78 F. (2d) 398 14

2. The great weight of authority sustains the Mutual Life's position..... 15–24

New York:

Chambers v. *New York Life*, 148 Misc. 561.. 15

Steinberg v. *New York Life*, 263 N. Y. 45... 15

Mutual Life v. *Levine*, App. Div. 16

Guardian Life v. *Katz*, 243 App. Div. 11.... 16

Mutual Life v. *Union Trust Co.*, 244 App. Div. 764 16

Mutual Life v. *Lipman*, N. Y. L. J. April 7, 1933, p. 2072..... 16

Mutual Life v. *Zweifach*, N. Y. L. J. May 19, 1936, p. 2559 16

PAGE

Connecticut General Life v. *Brandstein*, 233 App. Div. 723 16
Connecticut Mutual Life v. *Hirsch*, 240 App. Div. 816 16

State Courts:

Smith v. *Equitable Life*, 169 Tenn. 477 17
Mutual Life v. *McConnell*, 20 Pa. D. & C. 250 (1933) 17
New York Life v. *Gresham*, 170 Miss. 211 19
Greber v. *Equitable Life*, 43 Ariz. 1 19
Love v. *Prudential Ins. Co.*, 173 S. C. 433 ... 19
Millis v. *Continental Life*, 162 Wash. 555 19
Paulson v. *Montana Life*, 181 Wash. 526 19

District Courts:

New York Life v. *Davis*, 5 F. Supp. 316 19
Penn Mutual Life v. *Joseph*, 5 F. Supp. 1003. 19

C. C. A.:

Kaffanges v. *New York Life*, 59 F. (2d) 475. 19
New York Life v. *Gatti*, F. (2d) 20
Mutual Life v. *Strochmann*, 86 F. (2d) 47... 22
Pyramid Life Ins. Co. v. *Selkirk*, 80 F. (2d) 553 23

3. *Contra* authorities sustaining Stroehmann's contention 24–29

C. C. A. (4th):

Ness v. *Mutual Life*, 70 F. (2d) 59..... 24
New York Life v. *Truesdale*, 79 F. (2d) 481. 24
New York Life v. *Yerys*, 80 F. (2d) 264.... 24

Those cases criticised; and they should be rejected.

C. C. A. (9th):

Mutual Life v. *Markowitz*, 78 F. (2d) 396... 27
New York Life v. *Kaufman*, 78 F. (2d) 398.. 27
Horwitz v. *New York Life*, 80 F. (2d) 295.. 27

Those cases criticised; and they should be rejected.

Conclusion 29

APPENDIX—Legislative History of § 101..... 30

LIST OF AUTHORITIES

PAGE

American Life Ins. Co. v. *Stewart*, 299 U. S. (Feb. 1, 1937) 2, 5
Brady v. *Prudential Ins. Co.*, 168 Pa. St. 645..... 10
Burt v. *Union Central Life*, 187 U. S. 362..... 9
Cable v. *United States Life Ins. Co.*, 191 U. S. 288.... 5
Chambers v. *New York Life*, 148 Misc. 561; 240 App. Div. 1027..... 8, 15
Childress v. *Fraternal Union*, 113 Tenn. 252..... 9
Connecticut General v. *Brandstein*, 233 App. Div. 723.. 8, 16
Connecticut Mutual Life v. *Hirsch*, 240 App. Div. 816. 16
Elwood v. *New England Mutual*, 305 Pa. 505..... 10
Enelow v. *New York Life*, 293 U. S. 379..... 5
Flannagan v. *Provident Life*, 22 F. (2d) 136..... 9
Greber v. *Equitable Life*, 43 Ariz. 1..... 8, 19
Guardian Life v. *Katz*, 243 App. Div. 11, 269 N. Y. 625. 8, 16
Horwitz v. *New York Life*, 80 F. (2d) 295..... 27
Ill. Bankers Life v. *Byassee*, 169 Ark. 230..... 10
John Hancock Mutual Life v. *Yates*, 299 U. S. 178.... 5
Kaffanges v. *New York Life*, 59 F. (2d) 475..... 8, 19
Kiriakides v. *Equitable Life*, 174 S. C. 140.....19, 26, 29
Landress v. *Phoenix Ins. Co.*, 291 U. S. 491..... 9
Love v. *Prudential Ins. Co.*, 173 S. C. 433..... 8, 19
Loyal Americans etc. v. *Mayer*, 137 Ill. App. 574..... 28
Lumbra v. *U. S.*, 290 U. S. 551..... 9
Mayer v. *New York Life*, 74 F. (2d) 118..... 9
Metropolitan Life v. *Conway*, 252 N. Y. 449.....9, 10, 11, 18, 22, 28
Millis v. *Continental Life*, 162 Wash. 555..... 8, 19
Mutual Life v. *Hilton-Green*, 241 U. S. 613..... 5
Mutual Life v. *Johnson*, 293 U. S. 335..... 17
Mutual Life v. *Levine*, App. Div. ; N. Y. L. J. Jan. 16, 1936, p. 282..... 8, 16
Mutual Life v. *Lipman*, N. Y. L. J. April 7, 1933, p. 2072 16
Mutual Life v. *McConnell*, 20 Pa. D. & C. 250..... 8, 17
Mutual Life v. *Margolis*, Calif. , 53 Pac. (2d) 1017. 29
Mutual Life v. *Markowitz*, 78 F. (2d) 396.....6, 8, 19, 21, 27

PAGE

Mutual Life v. *Stroehmann*, 6 F. Supp. 95; 80 F. (2d) 47 ..... 6, 8, 14, 22
Mutual Life v. *Union Trust Co.*, 244 App. Div. 764 .... 8, 16
Mutual Life v. *Zweifach*, N. Y. L. J. May 19, 1936, p. 2559 16
Myers v. *Liberty Life*, 124 Kan. 191 9
Ness v. *Mutual Life*, 70 F. (2d) 59 ..... 6, 8, 19, 21, 24
New York Life v. *Davis*, 5 F. Supp. 316 ..... 8, 19
New York Life v. *Gatti*, F. (2d) (Oct. 6, 1936) .. 6, 8, 20 23, 26
New York Life v. *Gresham*, 170 Miss. 211 ..... 8, 19
New York Life v. *Kaufman*, 78 F. (2d) 398 ..... 8, 14, 19, 21, 27, 28
New York Life v. *Truesdale*, 79 F. (2d) 481 ..... 21, 24, 25
New York Life v. *Yerys*, 80 F. (2d) 264 ..... 14, 24, 25
Northwestern Mutual Life v. *Johnson*, 254 U. S. 96 9
Northwestern Mutual Life v. *McCue*, 223 U. S. 324 9
Paulson v. *Montana Life*, 181 Wash. 526 ..... 8, 19
Penn Mutual v. *Joseph*, 5 F. Supp. 1003 ..... 8, 19
Pope v. *Prudential Ins. Co.*, 29 F. (2d) 185 9
Pyramid Life v. *Selkirk*, 80 F. (2d) 553 ..... 8, 22, 23, 26
Royal Circle v. *Achterrath*, 204 Ill. 549 28
Ruddock v. *Detroit Life Ins. Co.*, 209 Mich. 638 9
Sanders v. *Jefferson Standard Life*, 10 F. (2d) 143 9
Scales v. *Jefferson Standard Life*, 155 Tenn. 412 19
Scarborough v. *Amer. Nat. Ins.*, 171 N. C. 353 9
Smith v. *Equitable Life*, 169 Tenn. 477 ... 8, 9, 10, 14, 17, 22, 26
Steinberg v. *New York Life*, 263 N. Y. 45 ..... 8, 15
Stipcich v. *Ins. Co.*, 277 U. S. 311 5
Sun Life Ins. Co. v. *Taylor*, 108 Ky. 408 28
United Sec. Life v. *Massey*, 159 Va. 832 11
U. S. v. *Spaulding*, 233 U. S. 498 9
Wilson v. *Equitable Life Ins. Co. of Iowa*, 220 Iowa 321. 29
Woodbery v. *New York Life*, 129 Misc. 365 9
Wright v. *Phila. Life*, 25 F. (2d) 514 9

55 ALR 549 10
67 ALR 1364 10

PAGE

New York Insurance Law, § 101
L. 1906, Ch. 326, p. 800 ..... 11, 30
L. 1909, Ch. 301, p. 563 ..... 11, 30
L. 1921, Ch. 407, § 1 ..... 11, 30
L. 1923, Ch. 28, p. 28 ..... 2, 3, 11, 30
Illinois, Act July 2, 1921 30

[References Required by Rules 12 and 27]

OPINIONS BELOW: (D. C.), *Mutual Life Ins. Co.* v. *Strochmann*, 6 F. Supp. (2d) 953; R. 160-168; F. Supp. (2d) R. 158-159; (C. C. A.), *Mutual Life Ins. Co.* v. *Strochmann* 86 F. (2d) 47.

JURISDICTIONAL AUTHORITY: Judicial Code § 240(a), as amended by Act of February 3, 1925.

STATUTES INVOLVED: § 101(2) Insurance Law, New York (L. 1923, ch. 28, § 1; Appendix, p. *infra*).

DATE OF JUDGMENT: July 2, 1935 R. 159 (D. C.); October 6, 1936 R. 179 (C. C. A.).

NATURE OF THE CASE, RULINGS, ETC.; Mutual Life sued to rescind and cancel a life insurance policy's "Disability Benefit" provisions only, on the ground of false fraudulent and material misrepresentations in their obtention (R. 3-19).

District Court dismissed the Bill of Complaint upon the ground that (as the suit was brought *more than one year* after the policy's date of issue) the "incontestable" clause barred the suit, following *Ness* v. *Mutual Life*, 70 F. (2d) 59, (C. C. A. 4th), and *Mutual Life* v. *Markowitz*, 78 F. (2d) 396, (C. C. A. 9th) [R. 158].

C. C. A.(3rd) *reversed* the District Court; declined to follow the *Ness* and *Markowitz Cases*, and held that the "incontestable" clause as authorized by § 101 New York Ins. Law *did not apply at all* to Disability Benefits (*Mutual Life* v. *Stroehmann*, 86 F. (2d) 47; R. 174-179).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936—No. 599

CARL F. STROEHMANN, *et al.*,
Petitioners.

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR MUTUAL LIFE INSURANCE CO.

The sole question involved is whether (despite the policy's *exception* italicized below*) the one year "incontestable" clause applies to the "Disability Benefits" provided for in Stroehmann's policy; and thereby prevents Mutual Life from rescinding such "Disability Bene-

* The Stroehmann policy provided (R. 135):

"**Incontestability**.—Except for non-payment of premiums and *except for the restrictions and provisions applying to the* Double Indemnity and *Disability Benefits as provided in Sections* 1 and *3* respectively, this Policy shall be incontestable after one year from its date of issue . . ." (R. 135).

fits", notwithstanding the gross fraud that Stroehmann perpetrated in order to obtain the policy.

Only a few weeks ago, this Court, in *American Life Ins. Co.* v. *Stewart*, 299 U. S. (February 1, 1937), pointed out the extent to which some courts have gone in enforcing incontestable clauses; and then gave this significant warning:

> "To make a contract incontestable after the lapse of a brief time is to confer upon its holder extraordinary privileges. We must be on our guard against turning them into weapons of oppression."

The C. C. A. (3rd, 5th, and apparently 1st and 10th), various District Courts, all the New York Courts [and the great weight of authority in other State Courts] hold that such an incontestable clause *does not apply at all* to "Disability Benefits"; while, on the other hand, the C. C. A. (4th and 9th) [and a small minority of State Courts] hold that it *does* so apply (p. 24, *infra*).

RELEVANT STATUTES

Since 1906, the New York Insurance Law, § 101, has required every policy to contain, in substance, certain "Standard provisions". The standard provision (as amended from time to time) for an "incontestable" clause, is given in the Appendix (p. 31, *infra*).

Since 1923, § 101 required each policy to contain, in substance, the following provision—the black faced type indicating the words first added by the 1923 amendment:

> "A provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue

except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war **and at the option* of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted"** (L. 1923, ch. 28, § 1).

STATEMENT OF THE FACTS

1. For nearly *thirty years* (1903-1930), Stroehmann was almost continuously under treatment by numerous doctors, surgeons and medical specialists at his residence and in hospitals, in West Virginia, Pennsylvania and Germany, for the following illnesses and surgical operations;

(*a*) Typhoid fever, pneumonia, rheumatism, influenza, tonsilitis, sinus trouble, typhoid-rheumatism, indigestion, nervousness, cramps, visceropotosis, spasms of larynx, and throat ailments;

(*b*) Broken ribs, contusions of kidney followed by hematuria, concussion of brain, and adhesions;

(*c*) At Wheeling, W. Va.; Williamsport, Norristown and Philadelphia, Pa.; Berlin, Frankfort and Black Forest, Germany;

(*d*) At hospitals and a sanitarium in Pennsylvania and in Germany;

(*e*) By Doctors MacGregor, Hardt, Little and Whalen;

(*f*) Operations for tonsillectomy and adhesions;

---

* The 1923 Amendment gave this "option" to the company, because certain companies issued policies with *both* Disability Benefits and Accidental Death Benefits; some companies did not issue them at all; and other companies issued only one, or the other, form of Benefits, but did not issue both forms.

(*g*) Other illnesses, diseases, injuries, surgical operations and medical attendance between 1925-1930

—all as chronologically summarized in the margin.*

2. On June 25, 1930, Stroehmann (a manufacturing baker aged 34 years) applied to Mutual Life for $40,000 ordinary life insurance, with "Double Indemnity", and with Level, Increasing and Waiver of Premium "Disability Benefits" (R. 108-110).

In the application, he was specifically asked to tell what illnesses, injuries, diseases and surgical operations

---

* 1903—Typhoid fever (R. 10).
1904—Pneumonia (R. 10).
1912—Rheumatism; two attacks (R. 10).
1914—Broken ribs; contusions of right kidney, followed by hematuria (R. 11).
1916—Concussion of the brain (R. 11).
1918—Influenza, resulting in sinus trouble lasting for ten years (R. 10; 14-15).
1922—Typhoid-rheumatism, tonsilitis and tonsillectomy (R. 11).
1923—Influenza (R. 11).
1925-1928—Headaches, mental sluggishness, indigestion, nervousness, cramps in stomach and run-down condition (R. 11-12).
1926—Visceroptosis (R. 11).
1928—Adhesions and operation therefor (R. 15).
1929—Spasms of the larynx, colds and nervousness (R. 15).
1930—Two months' confinement in bed; throat ailments; medical treatment in Germany (R. 15-16).
1925-1930—Other illnesses, diseases, injuries, surgical operations and medical attendance (R. 16).

Places: Wheeling, W. Va.; Williamsport, Norristown and Philadelphia, Pa.; Berlin, Frankfort and Black Forest, Germany (R. 11, 15, 16).

Hospitals: Wheeling Clinic, Williamsport Hospital, Sanitarium in Germany (R. 11, 15).

Doctors: MacGregor, Hardt, Little, Whalen and medical specialists in Germany (R. 11, 16).

As the District Court sustained a motion to dismiss the Amended Bill of Complaint, the facts as alleged therein must be taken as true (R. 159).

he had had; the names, addresses, etc., of every physician or practitioner who had prescribed for or treated him, or with whom he had consulted, in the preceding five years; the dates of consultation, injury or complaint, duration, effects, etc.; whether he had ever been at any cure, hospital or sanitarium; and whether he had been under any medical or other treatment or medical observation within the preceding one year (R. 112, 114).

To those searching questions, Stroehmann gave only the following scanty information, to-wit (R. 141-2):

> 1925; Appendectomy; one attack, lasting 24 days; complete recovery, with no complications or remaining effects,
>
> 1929; Dr. Drick, Williamsport, Pa., for Coryza. He expressly denied ever having been in any cure, hospital or sanitarium, except the above appendectomy in 1925 (R. 143).

The foregoing representations were false; Stroehmann knew them to be false; as a matter of law, they constituted concealments and misrepresentations material to the risk; and if known, they would have prevented the issuance of the policy (R. 11-12, 14, 16-17). Being unknown, in the event of discovery *within* the one year contestable period, they would have supported a decree for the cancellation and rescission of the entire policy or have defeated a suit at law.*

---

* *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 306; *Mutual Life Ins. Co.* v. *Hilton-Green*, 241 U. S. 613, 622-624; *Stipcich* v. *Ins. Co.*, 277 U. S. 311, 316-317, and cases there cited; *Enclow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379, 384; *American Life Ins. Co.* v. *Stewart* (No. 440, October Term 1936), decided Feb. 1, 1937,———U. S.———, and authorities there cited; Cf. *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178, 180.

3. On June 30, 1930, in entire ignorance of those flagrant misrepresentations and concealments, Mutual Life issued and delivered to Stroehmann its $40,000 policy, which also provided for a $400 monthly income (increasing to $600 and then to $800 a month) in the event of total permanent disability (R. 6-7, 119, 125).*

About October 11, 1932, Mutual Life first discovered Stroehmann's thirty years' medical and surgical history; immediately filed a Bill of Complaint (*a*) to rescind and cancel the "Disability Benefit" provisions on the ground of Stroehmann's fraud and (*b*) to enjoin any suit at law upon the "Disability Benefit" provisions (R. 11, 12, 16-18).

4. The DISTRICT JUDGE at first sustained the Bill of Complaint on the ground that the incontestable clause *did not apply* to the "Disability Benefits" (*Mutual Life Ins. Co.* v. *Strochmann,* 6 F. Supp. 95; R. 160-168); but, later, he felt constrained to follow the contrary opinions of the C. C. A. (4th and 9th, respectively) in *Ness* v. *Mutual Life Ins. Co.,* 70 F. (2d) 59, and *Mutual Life Ins. Co.* v. *Markowitz,* 78 F. (2d) 396 (reported after his original decision); and, on their authority, he dismissed the Amended Bill of Complaint (R. 158).

On appeal, the C. C. A. (3rd) declined to follow the 4th and 9th Circuits; and on the authority of its own recent opinion in *New York Life Ins. Co.* v. *Gatti,* ——F. (2d) ——, p. 20, *infra* (decided Oct. 6, 1936, not yet officially reported), it *reversed* the District Court (R. 174-179).

---

* Shortly before October 11, 1932, Stroehmann claimed that he was totally and permanently disabled, and demanded payment of that large monthly disability income (R. 17).

Certiorari was granted because of this conflict between the 3rd, 4th and 9th Circuits; but it was "limited to the question of the application and effect of the incontestability clause in policy No. 4,361,192" (R. 180).

* * * * * *

The expression "Disability Benefits" (used many times in Stroehmann's policy) always refers to the benefits granted in the event of his becoming "totally and presumably permanently disabled before age 60".

For brevity, the words "disability" or "disabled" as used in this Brief are to be understood as referring to "total and permanent disability before age 60".

SUMMARY OF POINTS DISCUSSED

1. Insurance Law § 101(2) as amended in 1923, authorized any insurance company to frame its "incontestable" clause so as to enable it to resist a suit for "Disability Benefits" on the ground that the policy was originally obtained by fraud, no matter how many years may have elapsed since the policy was issued (pp. 8-13).

2. Mutual Life had the right to rescind and cancel Stroehmann's Disability Benefits (notwithstanding the expiration of the one-year contestable period), because—under the statutory option granted by § 101—Mutual Life excepted the provisions for Disability Benefits from the "incontestable" clause (pp. 13-29).

FIRST POINT

Insurance Law § 101(2) as amended in 1923, authorized any insurance company to frame its "incontestable" clause so as to enable it to resist a suit for "Disability Benefits" on the ground that the policy was originally obtained by fraud, no matter how many years may have elapsed since the policy was issued.

The New York Courts, and all the State and Federal Courts which have considered the question, unanimously hold that under the 1923 amendment to § 101, a company can so frame its "incontestable" clause as to enable it to resist a suit for (or to sue to cancel) Disability Benefits, on the ground that the policy was obtained by false and fraudulent misrepresentations, even though such defense is not asserted (or such suit brought), until long after the balance of the policy has become incontestable (See cases collated in the margin*).

---

* *Ness* v. *Mutual Life*, 70 F. (2d) 59, 61 (C. C. A. 4th); *Pyramid Life* v. *Selkirk*, 80 F. (2d) 553, 554 (C. C. A. 5th); *New York Life* v. *Gatti*, F. (2d) (C. C. A. 3rd); *Mutual Life* v. *Stroehmann*, 86 F. (2d) 47, 49 (C. C. A. 3rd); *Kaffanges* v. *New York Life*, 59 F. (2d) 475; *New York Life* v. *Davis*, 5 F. Supp. 316, 319; *Penn Mutual* v. *Joseph*, 5 F. Supp. 1003, 1004; *Connecticut General* v. *Brandstein*, 233 App. Div. 723; *Chambers* v. *New York Life*, 148 Misc. 561, 240 App. Div. 1027; *Steinberg* v. *New York Life*, 263 N. Y. 45, 47; *Guardian Life* v. *Katz*, 243 App. Div. 11, 14, aff'd. 269 N. Y. 625; *Mutual Life* v. *Union Trust Co.*, 244 App. Div. 764; *Mutual Life* v. *Levine*, App. Div. ; N. Y. Law Journal Jan. 16, 1936, at p. 282, and Feb. 13, 1937, at p. 754; *Mutual Life* v. *McConnell*, 20 Pa. D. & C. 250; *New York Life* v. *Gresham*, 170 Miss. 211; *Smith* v. *Equitable Life*, 169 Tenn. 477; *Greber* v. *Equitable Life*, 43 Ariz. 1 COMPARE *Mutual Life* v. *Markowitz*, 78 F. (2d) 396, 397 (C. C. A. 9th); *New York Life* v. *Kaufman*, 78 F. (2d) 399, 404 (C. C. A. 9th); *Love* v. *Prudential Ins. Co.*, 173 S. C. 433; *Millis* v. *Continental Life*, 162 Wash. 555; *Paulson* v. *Montana Life*, 181 Wash. 526.

We might safely rest this point upon the authorities cited; but, in view of the reasoning of the C. C. A. (4th) and (9th), it will be useful to consider (1) just what an insurance company could do *before* the 1923 amendment, and then (2) just what additional power the amendment conferred upon insurance companies with respect to contesting fraudulent claims for Disability Benefits.

1. Even before the 1923 Amendment, an insurance company could always resist on the ground that the particular hazard or contingency insured against—whether death or disability—had not, in fact, occurred (*Matter of Met. Life Ins. Co.* v. *Conway*, 252 N. Y. 449, 452; *Smith* v. *Equitable Life*, 169 Tenn. 477); as, for example:

[A] That the insured had not *died*[1], or had not died *by accident*,[2] or had not become *disabled*[3]; or

[B] That the event which *actually did occur*, nevertheless *did not fall within the coverage terms of the policy*, as, for instance, that the insured (*a*) died in an airplane crash[4], duel, suicide[5], while intoxicated or violating the law[6], from injury inflicted by another[7], or from military or naval service[8], where the policy

---

[1] *Northwestern Life* v. *Johnson*, 254 U. S. 96, 102.

[2] *Landress* v. *Phoenix Ins. Co.*, 291 U. S. 491; *Pope* v. *Prudential Ins. Co.*, 29 F. (2d) 185 (CCA 6th), and cases there cited.

[3] *Lumbra* v. *U. S.*, 290 U. S. 551, 558; *U. S.* v. *Spaulding*, 293 U. S. 498, 504-5.

[4] *Mayer* v. *New York Life*, 74 F. (2d) 118, and many cases therein cited.

[5] *Wright* v. *Phila. Life*, 25 F. (2d) 514; *Woodbery* v. *New York Life*, 129 Misc. 365, and cases there cited; *Myers* v. *Liberty Life*, 124 Kan. 191; *Childress* v. *Fraternal Union*, 113 Tenn. 252.

[6] *Flannagan* v. *Provident Life*, 22 F. (2d) 136; *Scarborough* v. *Amer. Nat. Ins.*, 171 N. C. 353; *Burt* v. *Union Central*, 187 U. S. 362; *Northwestern Mutual* v. *McCue*, 223 U. S. 324.

[7] *Sanders* v. *Jefferson Standard Life*, 10 F. (2d) 143.

[8] *Ruddock* v. *Detroit Life Ins. Co.*, 209 Mich. 638, and cases there cited.

excepted deaths from those causes from its liability; or (*b*) became disabled from a self-inflicted injury[1], or from military or naval service, or where the insured failed to furnish proof of loss within the time limited in the policy[2], where the policy *excepted from its coverage* disability arising from those named causes.

This is so because the policy did not promise to pay the benefits in the event death or disability resulted under those specified circumstances.

Consequently, when an insurance company relied upon the grounds specified in [**A**] and [**B**], the Courts have always* held (1) that such action was not a "contest" of the policy, but was a mere insistence that the policy itself did not bind the company to pay the insurance; and (2) that the company could always raise the question whether or not (*a*) the particular claim was *covered* by the policy, or (*b*) the insured had complied with the particular provisions or conditions entitling him (or the beneficiary) to the benefits sued for (*Conway Case,* 252 N. Y. 449; *Smith Case,* 169 Tenn. 477).

On the other hand, the "incontestable" clause prevented the company (after the expiration of the contestable period) from contesting or defending on the ground that the policy was invalid from its inception on account of fraud, concealments or misrepresentations made in its obtention, or that it became thereafter invalid by reason

[1] *Elwood* v. *New England Mutual,* 305 Pa. 505.

[2] *Ill. Bankers Life* v. *Byassee,* 169 Ark. 230; *Brady* v. *Prudential Ins. Co.,* 168 Pa. St. 645.

* There are a number of "suicide" cases collected in the annotations to 55 ALR 549 and 67 ALR 1364 seemingly to the contrary; but it is significant that they were all decided before the illuminating analysis of the subject in *Metropolitan Life Ins. Co.* v. *Conway,* 252 N. Y. 449.

of a condition broken, unless specifically excepted in the "incontestable" clause (*Conway Case, supra; United Sec. Life* v. *Massey,* 159 Va. 832; s. c. 164 S. E. 529, 167 S. E. 248 and many cases there cited on both hearings).

The foregoing review demonstrates that despite an "incontestable" clause, a company may always insist (1) that the admitted contingency insured against, *has not actually happened;* or (2) that some other contingency which *has* actually happened, is *not within the terms* of the policy's coverage.

2. Since the adoption in 1906 of the "Standard provision" for "incontestability", there have been successive *exceptions* introduced into it, to-wit: *"except* for non-payment of premiums" (L. 1906, ch. 326, p. 800); *"except* for violation of the conditions of the policy relating to military or naval service in time of war" (L. 1909, ch. 301, p. 563); *"after* it has been in force during the lifetime of the insured for a period of" two years (L. 1921, ch. 407, § 1).

In 1923, the Legislature added a *further exception* to the "incontestable" provision of § 101, in these words:

> " . . . and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident *may also be excepted"* (L. 1923, ch. 28, p. 28).

The Legislature thereby gave to each insurance company "the option" to *except* from the required "incontestable" clause, all of the policy's,

> "provisions relative to benefits in the event of total and permanent disability . . ."

By thus authorizing the *exception* from the "incontestable" clause, of **"provisions relative to benefits in the event of total and permanent disability"**, the Legislature empowered the company, at its option, to remove from the operation of the "incontestable" clause all of the **provisions** relating to "Disability Benefits".

3. As a mere matter of *statutory construction*—and that is all we are now concerned with—it is plain that § 101(2) authorized every insurance company to *except* from its "incontestable" clause, all the provisions of the policy relating to Disability Benefits.

Omitting, for brevity and clarity, the previously authorized exceptions regarding non-payment of premiums, military or naval service, etc., in 1923 the Legislature authorized any insurance company to adopt an "incontestable" clause reading as follows:

> "*Except* for the **provisions** relative to benefits in the event of total and permanent disability, this policy shall be incontestable after two years from its date of issue";

Or, in the equivalent alternative form (following the language of the statute):

> "This policy shall be incontestable after two years from its date of issue, *except* for the **provisions** relative to benefits in the event of total and permanent disability."

Suppose a company had used either of those forms embodying the precise statutory language in its "incontestable" clause. It would mean that the "incontestable" clause *did not apply* to the provisions for Disability Benefits. It meant that, and nothing else. If it did not mean that, what did it mean? If it did not mean that, the English language has lost its meaning.

In the absence of an "incontestable" clause, a company may always resist suit on a policy, or sue to cancel it, because of false and fraudulent material misrepresentations in the application (p. 5 note, 8, *supra*). § 101, *as amended*, gave each company the option of *excepting* from the "incontestable" clause, the Disability Benefit provisions, so that it might defend against, or cancel, the Disability Benefit provisions, on the ground of fraud in their original obtention.

Did the Mutual Life fully exercise that option in the "incontestable" clause in Stroehmann's policy? With forty-eight States involved, language had to be selected to conform to all requirements (Cf. Laws of Illinois 1921 p. 482, July 2, 1921; p. 32, *infra*).

SECOND POINT

Mutual Life had the right to rescind and cancel Stroehmann's Disability Benefits (notwithstanding the expiration of the one-year contestable period), because —under the statutory option granted by § 101—Mutual Life excepted the provisions for Disability Benefits from the "incontestable" clause.

If Stroehmann became disabled before age 60, Mutual Life agreed, under the marginal heading "Disability Benefits", (1) to waive all premiums and (2) to pay him $400 monthly income [increasing to $600 and $800 per month] during his disability,

> "all upon the conditions set forth in Section 3" (Policy, Page 1, R. 119).

Section 3 defines disability and the conditions for the increased income; provides that Disability Benefits shall not be granted as the result of self-inflicted injuries, and will terminate in the event of military or naval service in time of war outside of the United States, etc. (Page 3, R. 124-126).

The Mutual Life's "incontestable" clause reads as follows (R. 135):

> **"Incontestability.**—Except for non-payment of premiums and **except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3** respectively, this Policy shall be incontestable after one year from its date of issue . . ."

Typical forms of "incontestable" clauses, exempting Disability Benefits therefrom (adopted by other Companies under the option in § 101) are given in the margin.*

Even the 3rd, 4th and 9th Circuits agree that those small variations in language mean the same thing (*Stroehmann Case,* 86 F. (2d) 47, 49; *Verys Case,* 80 F. (2d) 264; *Kaufman Case,* 78 F. (2d) 398, 403).

---

* NEW YORK LIFE (78 F. (2d), p. 402):

> **"Incontestability.**—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and *except as to provisions and conditions relating to Disability* Benefits."

CONNECTICUT GENERAL:

> "This policy shall be incontestable after . . . two years . . . *except as to provisions and conditions relating to benefits in the event of total and permanent disability.* . . ."

EQUITABLE LIFE ASSURANCE SOCIETY (169 Tenn. 477):

> "This policy, *except as to the provisions relating to Disability and Double Indemnity,* shall be (a) INCONTESTABLE after it has been in force . . . one year. . . ."

New York: The Courts hold that those excepting clauses of the Mutual Life, New York Life, etc., permitted the Company (even after the expiration of the one or two year "contestable" period) to defeat, or to sue to cancel, the Disability Benefits, on the ground of false representations in the original application.

For example, in *Chambers* v. *New York Life,* 148 Misc. 561, aff'd. 240 App. Div. 1027, the Court said:

> "The defendant [New York Life] by its counterclaim seeks to rescind that part of the policy which provides for disability and double indemnity. . . . The policies specifically except the incontestability for double indemnity and disability, and this exception is authorized by section 101, subdivision 2, of the Insurance Law. The law was amended in 1923 (Chap. 28) to cover the situation here involved, and the statute is effective to contracts issued after that date having such exception specified in the policy. I cannot agree with the plaintiff's [Chambers] theory that the contract here is but one **in view of the statutory sanction given to life insurance companies to except from the incontestability clause the double indemnity and disability benefits.** It will be observed that the policy in suit specifically shows the charge each year for double indemnity and disability benefits, so that it is not only possible but practicable to eliminate the benefits for which the plaintiff paid in the event that a final determination shall find that fraud and misrepresentation were practiced upon the defendant."

In *Steinberg* v. *New York Life,* 263 N. Y. 45, the Company was permitted to defend a suit for Disability Benefits, notwithstanding the expiration of the contestable period, the Court saying:

> "The two-year incontestable clauses contained in the policies prevent any defense as to the ordinary

life insurance provisions in the policies, **but do not apply to the disability and double indemnity benefits."**

In *Mutual Life* v. *Levine*, —— App. Div. —— (N. Y. Law Journal, Jan. 16, 1936, p. 282, Feb. 13, 1937, p. 754), the incontestable clause was exactly the same as in Stroehmann's policy. Six years after the policies were issued, the Mutual Life sued (as here) to rescind and cancel the Disability Benefits, on the ground of false representations in the application. The decree struck from the policies all of the provisions for Disability Benefits on the authority of *Guardian Life* v. *Katz*, 243 App. Div. 11 (aff'd. 269 N. Y. 625, 270 N. Y. 546), wherein the "incontestable" clause excepted "provisions relative to benefits in the event of total and permanent disability", with respect to which the Court said:

> "By the terms of the contract of insurance the right to contest, by action for a rescission or otherwise, the enforcibility of the disability benefit provisions is expressly reserved to the company, notwithstanding the lapse of the one-year period. Similar provisions have been construed and upheld." (Citations omitted.)

To the same effect, see *Mutual Life* v. *Union Trust Co.*, 244 App. Div. 764; *Mutual Life* v. *Lipman*, N. Y. L. J. April 7, 1933, p. 2072; *Mutual Life* v. *Zweifach*, N. Y. L. J. May 19, 1936, p. 2559; *Connecticut General Life* v. *Brandstein*, 233 App. Div. 723; *Connecticut Mutual Life* v. *Hirsch*, 240 App. Div. 816.

The foregoing authorities establish that Insurance Law, § 101, as amended, authorized insurance companies to except Disability Benefits from the "incontestable"

clauses; and that the Mutual Life's form of such exception (which is the same as used in Stroehmann's policy) *completely accomplished that result*—just as effectively as the slightly different language used by the New York Life, Connecticut General, Guardian Life and Connecticut Mutual accomplished a like result, by permitting them all to rescind and cancel Disability Benefits after the expiration of the ordinary contestable period.

As the law of New York, where the statutory exception was authorized, and the law of Pennsylvania, where the policy was delivered to Stroehmann (*Mutual Life* v. *McConnell,* 20 Pa. D. & C. 250 (1933)), agree as to the effect of the exact "incontestable" clause used in Stroehmann's policy, this Court, without going further, might well accept the rule in New York and Pennsylvania as final (*Mutual Life* v. *Johnson,* 293 U. S. 335, 339).

State Courts: The leading case is *Smith* v. *Equitable Life,* 169 Tenn. 477, where the Equitable Life's "incontestable" clause used the words "except as to the provisions relating to Disability" (p. 14, note, *supra*). The Court held that the company was entitled to a cancellation of the Disability Benefits on the ground of false representations in the application, although the policy had been in force more than two years, saying:

> "The language for construction (condensed by omitting matter not relevant to the issues under consideration) is: 'This policy except as to the provisions relating to disability * * * shall be incontestable after', etc. How can it be said, in the face of this quite definite excepting language, that it was intended to declare the policy to be incontestable as to its provisions for disability? The phrase 'relating to' is the equivalent of

pertaining to, having reference to (Webster's New International), terms that are comprehensive of the subject indicated.

As we understand the argument made for the insured, it is that the exception should be construed to apply, not to the general obligation, as a whole, to pay disability insurance, but only to the right to deny liability because certain prescribed conditions of liability applicable to claims arising under these heads have not been complied with, such as, under a claim for total and permanent disability, giving of notice and filing of proofs thereof within stipulated periods, or because the disability has resulted from military or naval service, or from self-inflicted injury. It is said that it was to preserve to the society the right to contest touching these matters after one year that the exception was inserted.

We think it apparent that the confusion which seems to have arisen in this case, and in several of those relied on for the insured, is due to a failure to appreciate the distinction between 'a denial of *coverage* and a defense of *invalidity*' which Chief Justice CARDOZO, when on the Court of Appeals of New York, so clearly emphasized in his opinion in *Metropolitan Life Ins. Co.* v. *Conway*, 252 N. Y. 449, 169 N. E. 642. In that case he said: [Quotation omitted].

There could be no possible necessity for the insertion of a clause reserving by exception the right to contest a claim for payment based on disability on the ground that the claim did not come within the terms of coverage, that is, the conditions upon and under which the insurance was to be paid, for example, a showing that the disability was total and permanent, and was not self-inflicted. Such rights of defense are never affected by time limitations relating to the execution of the contract, or issuance of the policy, but arise

only and may be asserted whenever claims are made under the contract."

After reviewing at length the *Ness, Markowitz, Kaufman and Kiriakides* cases (pp. 24-29, *infra*), and the contentions there made that the exception related only to certain minor provisions and not to the Disability Benefits as a whole, the Court said:

"We think it too plain for argument that every one of these provisions or conditions, are with respect to matters as to which the *exception* as to incontestability *could have no sort of reference.* Every one of the items enumerated relate to matters of coverage, conditions of the contract to pay which the company could, of course, rely upon consistently with recognition of the validity of the contract of insurance and without respect to any limitation upon contestability. See *Scales* v. *Jefferson Standard Life Insurance Co.,* 155 Tenn. 412, and cases therein reviewed, in which the distinction is made clear between the right to contest for invalidity and the right to deny liability for violation of, or noncompliance with, the conditions of the risk assumed."

To the same effect, see *New York Life* v. *Gresham,* 170 Miss. 211; *Greber* v. *Equitable Life,* 43 Ariz. 1; *Love* v. *Prudential Ins. Co.,* 173 S. C. 433; *Millis* v. *Continental Life,* 162 Wash. 555; *Paulson* v. *Montana Life,* 181 Wash. 526.

C. C. A. Cases*: The FIRST CIRCUIT (*Kaffanges* v. *New York Life,* 59 F. (2d), 475) held, without discussion,

* Two District Courts cases, *New York Life* v. *Davis,* 5 F. Supp, 316, and *Penn Mutual Life* v. *Joseph,* 5 F. Supp. 1003, 1004, are to the same effect as the State cases above reviewed.

that a New York Life policy [with the same "incontestable" clause involved in the other New York Life cases cited in this Brief].

> "contained the incontestable clause as to death benefits, but not as to the disability provisions".

The THIRD CIRCUIT held that the "incontestable" clauses used by the New York Life and Mutual Life, respectively, were "substantially the same"; and that where false representations had been made in the application, the companies were entitled to a cancellation of the Disability Benefits contained in the policies, even though in the case of the New York Life, nearly ten years, and in the case of the Mutual Life, more than two years, had elapsed since the policies were issued.

In *New York Life* v. *Gatti*, ——F. (2d)——, the Court said:

> "The United States Circuit Court of Appeals for the Fifth Circuit in the case of *Pyramid Life Insurance Co.* v. *Selkirk*, 80 Fed. (2d) 533, held that the insured had the right to rescind for fraud the provisions relating to disability and double indemnity benefits in a contract of insurance containing an incontestability clause substantially the same as the one in the case at bar.
>
> The United States District Court for the Western District of Pennsylvania in the case of *New York Life Insurance Company* v. *Davis*, 5 Fed. Sup. 516 reached the same conclusion. So have the state courts in the states of New York, Connecticut, Pennsylvania, Maryland, Mississippi, Arizona, Washington and Tennessee.
>
> We are concerned here with the 'provisions and conditions' relating to disability. Leaving out the

parts not material here, the excepting clause reads: 'This policy shall be incontestable after two years from its date of issue . . . except as to provisions and conditions relating to disability benefits'. It was clearly the purpose of the Insurance Company to except the provisions creating the obligation to pay these benefits from the incontestable provisions obligating it to pay insurance on the life of the insured. The policy clearly sets out the provisions and conditions relating to disability benefits and in definite and comprehensive language the excepting clause excludes these from the incontestability provisions.

But the United States Circuit Court of Appeals for the Fourth Circuit in the cases of *Ness* v. *Mutual Life Insurance Company of New York,* 70 Fed. (2d) 59 and *New York Life Insurance Company* v. *Truesdale,* 79 Fed. (2d) 481, and the Circuit Court of Appeals for the Ninth Circuit in the cases of *Mutual Life Insurance Co. of New York* v. *Markowitz,* 78 Fed. (2d) 396 and *New York Life Insurance Company* v. *Kaufman,* 78 Fed. (2d) 398 together with one or two state courts have reached a contrary conclusion. They hold that the exception in the incontestability clause applies to the *'provisions and conditions'* relating to disability and double indemnity benefits and not to the benefits themselves. For this reason, they say, the insurance company may not defend against a claim for disability benefits on the ground of fraud practiced in the procurement of the insurance if the period of limitation has expired.

We think this construction is untenable for two reasons:

1. The company may always, without an exception in the incontestability clause, contest the question as to whether or not a particular claim is covered by the policy. The question is purely one of coverage.

That is, whether or not the insured has complied with the particular provisions or conditions entitling him to benefits. *Metropolitan Life Assurance Co. v. Conway*, 252 N. Y. 449; *Smith v. Equitable Life Assurance Society*, 169 Tenn. 477.

2. The exception here does not intend to distinguish between the 'provisions and conditions' relating to benefits and the benefits themselves. These terms, 'provisions and conditions', are comprehensive of the subject to which they relate. *Smith v. Equitable Life Assurance Society, supra.* The expression 'provisions and conditions relating to disability benefits' even if tautological, embraces all matters relating to liability for such benefits. When these terms are combined nothing else relating to liability for disability benefits remains for consideration. Both are excepted from the operation of the incontestability clause. *Pyramid Life Insurance Co. v. Selkirk, supra.* The language is clear and definite and the parties perfectly well understood it or with ordinary intelligence should have understood it. The exception is stated in such language as not to permit a person deliberately to misrepresent the facts and practice fraud on the company for his personal advantage and then hide behind a refined construction of the language employed."

In *Mutual Life v. Strochmann*, 86 F. (2d) 47, 49, the Court reached the same conclusion, and said (R. 179):

"In *New York Life Insurance Co. v. Gatti*, and *New York Life Ins. Co. v. Ruhlin*, —— Fed. (2d) —— (recently decided), where the incontestability clause was *substantially the same* as the one quoted above [Mutual Life's], we held that the insurer not only had the right to contest liability under the double indemnity and disability provisions, but also the right to have those provisions rescinded in case of fraud, even though the

period of limitations set forth in the incontestability clause had run if a suit at law had not previously been instituted. **The incontestability clause would be meaningless and purposeless if we confine the appellant's right to contest liability thereunder to the limits of coverage set forth in sections 1 and 3. New York Life Insurance Co. v. Gatti, supra. That right it has without the excepting clause."**

The FIFTH CIRCUIT, in *Pyramid Life Ins. Co.* v. *Selkirk*, 80 F. (2d) 553, held that the insurance company had the right to cancel the Disability provisions from a life insurance policy, on the ground of fraud in the application, even though five years had elapsed since the policy was issued. The one year "incontestable" clause involved was exactly the same as that used by the New York Life (p. 14, note, *supra*); and the exception read "except as to *provisions and conditions* relating to Disability Benefits". The Court said:

"The effect of this exception, it seems to us, is to *exclude from the one-year limitation* of the incontestability clause, **all grounds of contest relating to liability for disability benefits,** not merely those based on conditions enumerated in the rider, leaving open to contest after one year the question of fraud in procuring the disability benefit contract [six citations omitted].

The expression, 'provisions and conditions relating to disability benefits,' even if tautological, embraces all matters relating to liability for such benefits; those which create the right to receive them, as well as those which will defeat the right. When the terms 'provisions' and 'conditions' are combined, nothing else relating to liability for disability benefits remains to be referred to, and both are excepted from the operation of this in-

contestability clause. It might have been briefer to have said, as suggested by appellee [Selkirk], that the policy is incontestable after one year 'except as to liability for disability benefits'. **But it would have been no more comprehensive.** Moreover, one of the 'provisions' relating to disability benefits is the promise of the insurer to pay them, made in reliance upon the insured's application which forms a part of the policy and in which the false representations are alleged to have been originally made. The 'provision' containing this promise is excluded from the protection of the incontestability clause and leaves such promise open to rescission for fraud in its procurement."

Contra Authorities Sustaining Stroehmann's Contention

The THIRD CIRCUIT, in *Ness* v. *Mutual Life*, 70 F. (2d) 59 (followed without further discussion in *New York Life* v. *Truesdale*, 79 F. (2d) 481, and *New York Life* v. *Yerys*, 80 F. (2d) 264, holding that the New York Life's "incontestable" clause was not materially different from that of the Mutual Life—all three opinions delivered by Judge Parker) apparently conceded (p. 61) that *if* the exception had been *phrased differently*, Disability Benefits could have been excluded from the operation of the "incontestable" clause; but that neither the Mutual Life's nor the New York Life's language was broad enough to accomplish that result.

The Court held that the exceptions of "the restrictions and provisions applying to the Disability Benefits as provided in Section 3" (*Ness case*) and "as to provisions and conditions relating to Disability Benefits" (*Truesdale*

and *Yerys cases*) were some thing very different from the statutory § 101 authorization of an exception of the "provisions relative to benefits in the event of total and permanent disability".

The Court said:

"The purpose of the second exception [*re* Disability Benefits] in the incontestability clause was to make clear that, notwithstanding the provisions of that clause, the company reserved the right to rely upon the restrictions and provisions contained in sections 1 and 3. . . . And the right was reserved to contest, under section 3, claims for disability where due proofs had not been furnished, or where upon request of the company proofs of the continuance of the disability had been refused, or where the disability resulted from self-inflicted injury or from military or naval service beyond the continental limits of the United States and Canada. . . . If it had been the intention of the company that the right to contest liability for double indemnity or disability benefits should not be affected by the incontestability clause it would have been easy enough to use language making that intention clear, as by simply wording the second exception to the incontestability clause to read: 'Except as to liability for double indemnity or disability benefits.' . . . The incontestability clause was directed at defenses which might be asserted to the policy. The exception which we are considering was clearly intended to except certain defenses from the operation of that clause; and, equally clearly, the defenses so excepted were those enumerated in the sections to which specific reference was made, *i. e.* sections 1 and 3. These Sections provide the restrictions and provisions under which the promise with respect to double indemnity and disability made in the face of the policy are to be enjoyed. And the second exception in the incontestability clause preserves de-

fenses arising out of these restrictions and provisions against the general effect of the clause. It is to be noted that the exception is, not as to the double indemnity and disability benefits, but as to 'restrictions and provisions applying to the double indemnity and disability benefits'."

To those views, we reply:

(1) They are fully answered in *Pyramid Life* v. *Selkirk*, 80 F. (2d) 553, 554, p. 23, *supra; New York Life* v. *Gatti*, — F. (2d) — p. 20, *supra* and in *Smith* v. *Equitable Life*, 169 Tenn. 477 (p. 17, *supra*), wherein it is also pointed out that Judge Parker "overlooked the distinction emphasized by Chief Justice Cardozo between a denial of coverage and a defense of invalidity", and that the *Kiriakides* case overlooked the same distinction.

(2) The defense which Judge Parker says the Mutual Life *attempted* to preserve, were all preserved to it anyway, without any exception in the "incontestable" clause.

(3) Judge Parker was in error when he said that the Mutual Life "clearly intended to except certain defenses", which "defenses so excepted were those enumerated in Section 3." The Mutual Life was not trying to "except" *defenses;* but only to provide that the policy should be incontestable "*except* for the restrictions and provisions applying to the Disability Benefits as provided in Section 3".

Judge Parker's paraphrase is not the equivalent of the language itself.

(4) The Mutual Life agreed to pay to Stroehmann certain "Disability Benefits" **"all upon the conditions set forth in Section 3"**: and that the policy should be incontestable **"except for the restrictions and provisions applying to the Disability Benefits as provided in Section 3".**

That language has been held by all the courts to be the *legal equivalent* of the language used by the other insurance companies, and especially that of the Equitable Life, *i. e.* "provisions relating to disability", which, in turn, is almost the precise language of § 101, *i. e.* "provisions relative to benefits in the event of total and permanent disability".

(5) Judge Parker has discovered a distinction [between the "option" granted in § 101, and the language used by the Mutual Life and by the New York Life] which is too refined for practical application.

When the "man in the street" reads the Mutual Life's promise to pay certain "Disability Benefits" "upon the conditions set forth in Section 3", and then that the policy is incontestable "except for the restrictions and provisions applying to the Disability Benefits as provided in Section 3" [which is the only place in the policy that Disability Benefits are provided for], he would understand that whatever provisions the policy did contain about Disability Benefits, were certainly excepted from the "incontestable" clause. And this is so because only by resorting to Section 3 can the provisions for Disability Benefits be determined.

The NINTH CIRCUIT, in three opinions by Judge Denman (*Mutual Life* v. *Markowitz*, 78 F. (2d) 396, *New York Life* v. *Kaufman*, 78 F. (2d) 398, and *Horwitz* v. *New York Life*, 80 F. (2d) 295), follows the *Ness* case.

As there are no arguments in the *Kaufman* case beyond those in the *Ness* case, it is unnecessary to review the *Kaufman* case, especially as Stroehmann's brief merely cites it with a casual quotation on a point not really involved.

Apparently the NINTH CIRCUIT is not in accord with the fundamental distinction between "coverage" and a

"defense of invalidity" (*Conway* case, 252 N. Y. at 452), which may explain the *Kaufman* decision wherein Judge Denman says (78 F. (2d) at 406):

> "It is true that there are decisions such as that of Judge Cardozo in *Metropolitan Life Ins. Co.* v. *Conway*, 252 N. Y. 449, holding that such provisions are descriptive details of the coverage and that a contest as to whether the insured's claim came within their limits would survive after the two-year period had elapsed. . . . Other courts have held similar provisions incontestable after the lapse of time bringing into effect the incontestability clause. *Royal Circle* v. *Achterrath*, 204 Ill. 549; *Sun Life Ins. Co.* v. *Taylor*, 108 Ky. 408; *Royal Americans of Republic* v. *Mayer*, 137 Ill. App. 574."

Instead of the *Royal Circle*, *Sun Life* and *Loyal Americans* cases being contrary* to Judge Cardozo's decision, they fall directly within his category that "within the limits of the coverage, the policy shall stand, unaffected by any defense that it . . . became invalid by reason of a condition broken". Judge Denman failed to distinguish between "a denial of coverage and a defense of invalidity" (*Conway* case, at 452).

The very fact that Judge Denman cited those cases as illustrative of a divergence from Judge Cardozo's opinion, when, in point of fact, they expressly fall within it, illustrates how completely Judge Denman misconceived the

---

* In the *Royal Circle* case, the constitution of a fraternal order provided that if the member died in a duel or from suicide, his certificate should be void; and in the *Sun Life* case, the policy provided that it should be void if the insured died in consequence of his own criminal action.

As Judge Cardozo explained (p. 453), the "incontestable" clause "will sustain a recovery in the face of a forfeiting condition", but "It is quite another thing to say that the same facts will prevail against a refusal to assume the risk". It is that distinction which Judge Denman wholly failed to grasp.

necessity for the § 101 statutory exception to the "incontestable" clause.

State cases: *Kiriakides* v. *Equitable Life,* 174 S. C. 140, follows the *Ness* case with a very long quotation from it, but advances no additional reasons.

In *Wilson* v. *Equitable Life Ins. Co. of Iowa,* 220 Iowa, 321, the exception in the "incontestable" clause was very different from that of the New York companies. The case turned largely on the particular language used by the Iowa Company, although the argument is, in substance, the same that Judge Parker advanced in the *Ness* case.

In *Mutual Life* v. *Margolis,* —— Calif. ——, 53 Pac. (2d) 1017, the *Ness* case was fully reviewed and followed; but no additional argument was advanced.

Conclusion

In its last analysis, this Court must, *first,* determine whether it will follow the decisions of the New York Courts as to the effect of the "incontestable" clauses adopted under § 101; and, if it is not prepared to accept those decisions, then; *second,* construe for itself § 101 and the "incontestable" clauses adopted by the different companies, giving such weight as it thinks proper to the opposing arguments expressed in the *Pyramid Life, Gatti, Smith* and *Chambers* cases, on the ne hand, and in the *Ness* case, on the other; and, *third,* solve the conflict between the several Circuit Courts of Appeals.

FREDERICK L. ALLEN
REESE H. HARRIS
WM. MARSHALL BULLITT
Counsel for Mutual Life Ins. Co.

March 9, 1937

APPENDIX

History of New York's "Standard Provision" For an "Incontestable" Clause in Life Insurance Policies.

In 1906 following the Armstrong Investigation, "Standard forms" of policies were prescribed, which contained the following incontestable clause:

> **"Incontestability.** This policy shall be incontestable, except for non-payment of premiums [one or two years] from its date" (§ 101; L. 1906, ch. 326, § 37).

In 1909, § 101 was amended to require every policy to contain, in substance:

> "A provision that the policy shall be incontestable after two years from its date of issue except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war" (Insurance Law § 101; L. 1909, ch. 301, § 7).

§ 101 was further amended by the insertion in 1921 of the following italicized words, and in 1923 by the addition of the words in black faced type:

"A provision that the policy shall be incontestable after *it has been in force during the lifetime of the insured for a period of* two years from its date of issue except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war, **and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted"** (L. 1921, ch. 407 § 1; L. 1923, ch. 28, § 1; § 101 Insurance Law).

In 1921, Illinois had granted authority for an exception as follows;

> ". . . except as to *provisions and conditions* relating to benefits in the event of total and permanent disability and those granting additional insurance specifically against death by accident" (Laws of Illinois, p. 482; Act July 2, 1921).

SUPREME COURT OF THE UNITED STATES.

No. 599.—October Term, 1936.

Carl F. Stroehmann and Lycoming Trust Company, Trustee, Petitioners, *vs.* Mutual Life Insurance Company of New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 29, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

By a policy dated June 30, 1930, respondent Insurance Company, a New York corporation, agreed to pay the named beneficiary $40,000.00 upon death of Carl F. Stroehmann, the insured. Or to pay $80,000.00 if his death results from accidental bodily injury, "all upon the conditions set forth in Section 1." "And if the Insured is totally and presumably permanently disabled before age 60, will pay to the Insured $400.00 monthly during such disability, increasing after five and ten years continuous disability, besides waiving premium payments, all upon the conditions set forth in Section 3."

The policy is a long and complicated document. It incorporates the application and the Medical Examiner's report.

Section 1 (two printed pages) relates to the "Double Indemnity" obligation. It defines the injury to which the insurance applies, specifies the necessary proof, optional modes of settlement, etc.

Section 3—"Benefits in Event of Total and Permanent Disability before Age 60", is in the margin.[1] It defines total and per-

[1] "Section 3.—Benefits in Event of Total and Permanent Disability before Age 60.

"Total Disability.—Disability shall be considered total when there is any impairment of mind or body which continuously renders it impossible for the Insured to follow a gainful occupation.

"Permanent Disability.—Total disability shall, during its continuance, be presumed to be permanent;

"(a) If such disability is the result of conditions which render it reasonably certain that such disability will continue during the remaining lifetime of the Insured; or,

"(b) If such disability has existed continuously for ninety days.

manent disability; states when benefits will become effective; what they shall be; when premiums will be waived. Also specifies what will be considered permanent disability, when proofs may be demanded, etc. And provides: "Disability Benefits shall not be granted if disability is the result of self-inflicted injury. The provision for Disability Benefits shall automatically terminate if the Insured shall at any time, voluntarily or involuntarily engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada." Other provisions relate to termination of such benefits, reduction of premiums thereafter, etc.

Neither Section 1 nor 3 contains anything relative to fraud in obtaining the policy or the effect of false statements in the application.

Section 14—"Miscellaneous Provisions" (two pages) contains the following paragraph: "Incontestability.—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as pro-

"When Benefits become Effective.—If, before attaining the age of sixty years and while no premium on this Policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, as defined above, the Company will grant the following benefits during the remaining lifetime of the Insured so long as such disability continues.

"Benefits. (a) Increasing Income.—The Company will pay a monthly income to the Insured of the amount stated on the first page hereof ($10 per $1,000 face amount of Policy), beginning upon receipt of due proof of such disability and increasing after sixty consecutive monthly payments have been made to one and one-half times such amount and after sixty further consecutive monthly payments have been made to twice such amount at which it shall remain while total and permanent disability continues.

"(b) Waiver of Premium.—The Company will also, after receipt of such due proof, waive payment of each premium as it thereafter becomes due during such disability.

"Specified Disabilities.—The entire and irrecoverable loss of the sight of both eyes, or of the use of both hands or both feet or one hand and one foot, will be considered total and permanent disability.

"General Provisions.—The Company may, before making any income payment or waiving any premium, require due proof of the continuance of total and permanent disability, but such proof shall not be required oftener than once a year after such disability has continued for two years. If such proof is not furnished on demand or if it shall appear to the Company that the Insured is no longer totally and permanently disabled, no further income payments will be made or premiums waived.

"Neither the dividends nor the amount payable in any settlement hereof shall be decreased because of Disability Benefits granted.

"If the Insured shall at any time so recover that the payment of Disability Benefits terminates and later shall furnish due proof that he has again become totally and permanently disabled, Disability Benefits shall be the same in

vided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

In October, 1932, respondent filed a bill (afterwards amended) against Stroehmann, the insured, and the beneficiary in the United States District Court, Middle District, Pennsylvania. It alleged that the policy had been obtained upon false and fraudulent misrepresentations and concealments material to the risk. It asked that the Disability Benefits provisions be cancelled, also for an injunction against suit at law upon them.

Relying upon the Incontestability clause the petitioner moved that the bill be dismissed. The trial court sustained the motion, holding that as more than a year had elapsed since the policy took effect the limitation was applicable and controlling. The Circuit Court of Appeals thought otherwise and reversed the challenged decree.

The matter is here by certiorari limited to the question of the application and effect of the Incontestability clause.

No reason appears to doubt the power of the insurer to except from the ordinary Incontestability clause all policy provisions relating to Disability Benefits. Ch. 28, Laws N. Y. (1923); *Steinberg* v. *N. Y. Life Ins. Co.*, 263 N. Y. 45. But the petitioner maintains that the words used in the policy before us are inadequate definitely to disclose a purpose so to do. And we think the point is well taken.

In *Mutual Life Insurance Co. of New York* v. *Hurni Packing Co.*, 263 U. S. 167, 174, this Court said: "The rule is settled that

---

amount and subject to the same conditions as if no prior disability had existed.

"If the disability of the Insured shall be the result of insanity, income payments shall be payable to the beneficiary, if any, instead of to the Insured.

"Any disability income payment which may become payable and which is unpaid at the death of the Insured shall be paid to the beneficiary.

"Disability Benefits shall not be granted if disability is the result of self-inflicted injury.

"The provision for Disability Benefits shall automatically terminate if the Insured shall at any time, voluntarily or involuntarily, engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada.

"If requested in writing by the Insured, the Company will terminate the provision for Disability Benefits by endorsement on this Policy.

"If the Insured attains the age of sixty years or if the provision for Disability Benefits terminates, the premiums payable after such age or such termination shall be reduced by the premium for such benefits."

in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it." See *Royal Insurance Co.* v. *Martin*, 192 U. S. 149, 162, 165; *Bergholm, et al.* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 492.

Examination of the words relied upon to show an exception to the Incontestability clause of the policy discloses ample cause for doubt concerning their meaning. The arguments of counsel have emphasized the uncertainty. The District Court and the Circuit Court of Appeals reached different conclusions, and elsewhere there is diversity of opinion.

The District Court accepted the view approved in *Ness* v. *Mutual Life Ins. Co. of New York* (Fourth Circuit), 70 F. (2d) 59, and *Mutual Life Ins. Co. of New York* v. *Markowitz*, (Ninth Circuit), 78 F. (2d) 396, which presented for interpretation language identical with that now before us. The Circuit Court of Appeals followed its earlier opinion in *N. Y. Life Ins. Co.* v. *Gatti*, (Oct. 6, 1936), where the company employed different language. Certain life companies undertake to make exceptions to the Incontestability clause by words more precise than those now under consideration, and opinions in cases arising upon their policies must be appraised accordingly.

Without difficulty respondent could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. And applying the settled rule, the insured is entitled to the benefit of the resulting doubt.

The decree of the Circuit Court of Appeals must be reversed. The decree of the District Court is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.